

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DEREK SCHMIDT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT	
6	NICOLE A. SAHARSKY, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioner	17
9	ORAL ARGUMENT OF	
10	NEAL KATYAL, ESQ.	
11	On behalf of the Respondent	28
12	REBUTTAL ARGUMENT OF	
13	DEREK SCHMIDT, ESQ.	
14	On behalf of the Petitioner	55
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-609, Kansas v. Cheever.

5 General Schmidt.

6 ORAL ARGUMENT OF DEREK SCHMIDT

7 ON BEHALF OF THE PETITIONER

8 MR. SCHMIDT: Mr. Chief Justice, and may it
9 please the Court:

10 Once the Respondent made the trial decision
11 to make his mental status an issue and then supported
12 his argument by introducing, as evidence, the testimony
13 of a mental health expert who had examined the
14 defendant, he no longer could properly claim the
15 protection of the Fifth Amendment to avoid like kind
16 rebuttal by another court-appointed expert.

17 When the Kansas Supreme Court allowed the
18 Respondent to do just that, it committed constitutional
19 error and should be reversed for three reasons. First,
20 this Court's cases point to the opposite conclusion.
21 Second, allowing this mental or mental expert rebuttal
22 is consistent with this Court's precedent with the
23 purposes of the Fifth Amendment, and it is fair.

24 And third, a holding that is consistent with
25 the Kansas Supreme Court's rule would have the effect of

1 undermining the truth-seeking function of the trial by
2 excluding relevant evidence from the jury, especially in
3 the mental health context, where the jury has to make an
4 assessment based upon --

5 JUSTICE SCALIA: Of course, that would --
6 that would be true, the last would be true, even if the
7 defendant had not sought to introduce expert evidence of
8 his own, right?

9 MR. SCHMIDT: It -- that would be true, Your
10 Honor. We're not asking for a rule that that's -- that
11 is that broad. We're asking for a rule of parity that
12 allows that, once the defendant has opened the door by
13 putting his own expert on, the government may respond in
14 kind.

15 JUSTICE KENNEDY: Well, but just -- I have
16 the same concern as Justice Scalia. I mean, that makes
17 your case easier, but it seems to me that the defendant
18 puts his mental capacity in issue and then testifies
19 himself, but with no expert, the State can still call
20 its own expert so far as the -- so far as the Federal
21 constitution is concerned. There might be some Kansas
22 rules about it.

23 MR. SCHMIDT: Your Honor, that may well be
24 true, and the language of this Court's precedence
25 through Smith and Buchanan, for example, suggests that

1 the rule may be broader than the minimum that we're
2 asking for today.

3 JUSTICE SCALIA: Of course, the issue is not
4 whether the State can call its own expert. The issue is
5 whether the State can compel him to speak to its
6 expert --

7 MR. SCHMIDT: Yes, Your Honor.

8 JUSTICE SCALIA: -- without which the expert
9 can testify, right?

10 MR. SCHMIDT: Yes, Your Honor. The -- the
11 Fifth Amendment, of course, is implicated when we're
12 talking about a mental health expert who has conducted
13 an examination of the defendant and the Respondent.
14 That's what we believe is appropriate here, in terms of
15 the parity rule. Once the defendant puts on his expert,
16 who has done so, the government may respond in kind.

17 JUSTICE GINSBERG: General -- general --

18 JUSTICE KENNEDY: If I could just make -- it
19 seems to me that it's not necessary to make our decision
20 depend on whether or not another expert has been called.
21 That makes your case easier. And sometimes, when we
22 write opinions, we take the easiest route.

23 But I take it, under your theory, even if
24 the defendant had not called his own expert, we would
25 still have the same issue before the Court, and you

1 would take the position that a prosecution expert can
2 testify. Now, whether or not he can use the previous
3 statement, that's -- that's the second point.

4 MR. SCHMIDT: And, Your Honor, the -- the
5 hypothetical Your Honor posits is closely related to the
6 second question Kansas presented, which was not granted
7 in this case, which would be the impeachment use once
8 the defendant himself has testified.

9 JUSTICE GINSBURG: But he -- the defendant
10 would have to introduce the issue of his mental state,
11 either by his own testimony or an expert, but there's an
12 oddity about this case.

13 Do I understand correctly, General Schmidt,
14 that, if there had never been a Federal proceeding, if
15 this case had proceeded from start to finish in the
16 Kansas courts, there would have been no Welner evidence,
17 there would have been no prosecution expert, because it
18 wouldn't have been allowed under Kansas's own rules?

19 MR. SCHMIDT: Your Honor, Kansas law makes
20 the distinction between voluntary intoxication as a
21 defense and mental disease or defect as a defense. And
22 it does provide a mechanism under the mental disease
23 pleadings for the obtaining of a court-ordered mental
24 evaluation, not under the other.

25 JUSTICE GINSBURG: This -- this case was

1 voluntary intoxication and -- and under Kansas
2 procedure, the -- the prosecution could not have called
3 a witness absent insanity or a mental disease; is that
4 right?

5 MR. SCHMIDT: Justice Ginsburg, it is
6 correct that Kansas could not have called a witness
7 under a voluntary intoxication defense -- could not have
8 obtained a court-ordered mental evaluation. That is
9 correct.

10 The reason I didn't merely say yes is we do
11 have some disagreement with the other side that would be
12 dealt with in the courts below as to whether this truly
13 was a voluntary intoxication defense, since the other
14 side's expert did put the long-term effects on the
15 defendant's mental capacity into issue based on his
16 methamphetamine use.

17 JUSTICE ALITO: General Schmidt, am I wrong
18 to think that the issue in this case is whether there
19 was compulsion at the time when the statement was made
20 to the -- the court-ordered expert?

21 MR. SCHMIDT: Justice Alito --

22 JUSTICE ALITO: That's the issue. It's
23 not -- it wouldn't be a question of whether there was a
24 violation of the Fifth Amendment privilege at the time
25 when the statements were later introduced in the Kansas

1 trial.

2 Isn't it very well settled in this Court's
3 precedents that the introduction of statements
4 obtained -- that the introduction of statements at a
5 trial is not -- does not implicate the Fifth Amendment
6 privilege?

7 MR. SCHMIDT: Well, Your Honor, the -- the
8 compulsion question is a threshold question. And to the
9 extent this Court has recognized, for example, in cases
10 like Ventriss, that there are truly compelled statements
11 in a Portash or Mincey sort of circumstance, that
12 threshold issue would resolve it.

13 This is not that case. In fact, any
14 compulsion that might be involved here is much closer to
15 what happens when a defendant makes a trial decision to
16 offer himself as a witness and go on the stand, and
17 then, as a matter of operation of law, must subject
18 himself to cross-examination.

19 JUSTICE ALITO: Well, that's the issue, as I
20 see it, but maybe I'm wrong -- correct me if I'm wrong,
21 and maybe Mr. Katyal will -- that the issue is whether
22 there was unconstitutional compulsion at the time when
23 the statements were obtained. But I thought it was very
24 well settled that if there -- there wasn't compulsion at
25 that time, then the later introduction of the statements

1 into the -- into evidence at the trial does not
2 implicate the privilege against self-incrimination.

3 MR. SCHMIDT: That would certainly be true,
4 Justice Alito, absolutely.

5 JUSTICE ALITO: So what happened in -- in
6 State court really is -- is irrelevant to this. This
7 is -- everything that -- everything important here was
8 done under Rule 12.2 of the Federal Rules of Criminal
9 Procedure and that's -- and that's the issue.

10 MR. SCHMIDT: If the compulsion test settles
11 the matter, Justice Alito, yes, that is correct. Even
12 if it doesn't settle the matter, we think there was then
13 subsequently a waiver at the time the evidence was
14 introduced in the State's trial.

15 JUSTICE KENNEDY: But -- but why doesn't it
16 settle the matter as a -- as you understand the case
17 that's being presented -- as a constitutional matter?
18 Sure. Kansas may have some rules, maybe the judges say
19 I'm not going to hear this, this -- this is a State
20 rule, but insofar as the -- the Federal constitution is
21 concerned, why doesn't that settle it?

22 MR. SCHMIDT: Your Honor, I think it can.
23 There is some dispute between the parties on whether
24 there is a sort of category of compulsion, called
25 something else perhaps, which doesn't rise to the

1 Portash-Mincey constitutional bar standard.

2 For example, the Respondent has argued that,
3 although this may not be like Portash and Mincey, there
4 is still, nonetheless, some inappropriate burden upon
5 the choice that was made and that that is somehow
6 constitutionally suspect. So I'm merely trying not to
7 concede the ground that, even if -- and I agree with
8 you -- there was not constitutionally barred compulsion
9 here, still, there is a way for Kansas to prevail in the
10 case.

11 JUSTICE SCALIA: But sort of coming back to
12 Justice Ginsburg's question, the Kansas Supreme Court
13 held that the introduction of -- of the allegedly
14 compelled testimony given to the -- to the psychiatrist
15 violated the Federal Constitution. But why didn't --
16 why didn't the Kansas Supreme Court simply hold that
17 there was no -- no right on the part of the prosecution
18 to obtain that rebuttal evidence or to introduce it
19 since this was a case of voluntary intoxication?

20 You -- you tell me that Kansas does not
21 allow this just for voluntary intoxication, and that
22 was -- that was the defense he was raising, right?

23 MR. SCHMIDT: Your Honor, I don't know why
24 the Kansas Supreme Court chose to settle this by
25 interpreting the Fifth Amendment in a manner that we

1 believe is incorrect, but nonetheless, that's what they
2 did.

3 JUSTICE SCALIA: That's what they did. So
4 when -- when we send it back, is it still open to them
5 to decide that, under Kansas law, the testimony was not
6 introducible?

7 MR. SCHMIDT: Your Honor, I suspect that, if
8 this case is remanded, there will be a variety of other
9 issues presented to the Kansas court, and it will have
10 to determine how to resolve them.

11 JUSTICE GINSBURG: One issue is whether the
12 expert, the government's expert, went beyond the scope
13 of the direct, the experts for the defendant. That's an
14 open -- that would be an open issue because I think
15 Rule -- the Federal Rule 12.2 is very clear that the
16 rebuttal testimony cannot exceed the scope of the
17 defense expert's testimony.

18 MR. SCHMIDT: Justice Ginsburg, it may well
19 be likely that, upon remand, the scope issue would come
20 before the Kansas court to be resolved under principles
21 of Kansas evidentiary law. In this case, of course,
22 while it's been argued at some length by Respondent, we
23 don't think the scope question is necessarily or
24 properly in front of this Court.

25 It was a threshold determination made by the

1 Kansas court that the Fifth Amendment keeps our rebuttal
2 witness off the stand at all, and we have to get past
3 that in order to get to related questions.

4 JUSTICE SCALIA: And that is, as you say, a
5 question of -- of Kansas law, so it would be odd for us
6 to resolve that anyway.

7 MR. SCHMIDT: Well, Your Honor, I think that
8 is a question of Fifth Amendment law. The Kansas
9 Supreme Court interpreted the Fifth Amendment as
10 creating a bar upon Dr. Welner's testimony.

11 JUSTICE SCALIA: I'm saying the question of
12 whether the -- the cross-examination went beyond the
13 scope of the direct and whether that invalidated it,
14 that wouldn't be resolved under the Federal Rules of
15 Civil Procedure, but rather under Kansas law, right?

16 MR. SCHMIDT: Your Honor, I believe that is
17 correct. As a practical matter, this Court has
18 recognized, in the Fifth Amendment context, that there
19 are outer constitutional bounds with respect to scope,
20 for example, the relevancy statute you recognized in
21 both Brown and Magatha.

22 But those are not implicated here. And as a
23 practical matter, the sorts of allegations that
24 Respondent is now making, although they weren't objected
25 to at trial with respect to specific aspects, would be

1 matters resolved under the Kansas Rules of Evidence.

2 JUSTICE BREYER: Should we say anything
3 about that? I mean, one of the things he testified
4 to -- that is, the government expert testified to -- the
5 defendant is one of those unusual people who was
6 actually exposed to a variety of different people in his
7 life.

8 He had people who were criminal types.
9 There were drug users. He found himself identifying and
10 looking up to people alternatively described as "bad
11 boys" or "outlaws," looking up to them, being impressed
12 and awed by them and, in certain circumstances, wanting
13 to outdo them.

14 Well, that doesn't seem to have much to do
15 with the issue that the defendant put into the -- wanted
16 to put in, in the Federal court, which was he wanted to
17 ask about his -- about his -- his words exactly are "a
18 defense of insanity," which can be interpreted broadly,
19 namely, whether you're insane or not.

20 So we both have the government expert saying
21 no, he's not insane, and the government expert going on
22 to give an explanation of why he shot the sheriff, so is
23 that -- is that, in your opinion, something we should
24 say that's a serious question, whether that exceeds it,
25 et cetera? What should we say about it?

1 MR. SCHMIDT: Justice Breyer, if the Court
2 wishes to speak to scope, I think it could reaffirm that
3 the constitutional standard, as it suggested in both
4 Magatha and Brown, is reasonably related or relevant to
5 the -- the direct examination.

6 JUSTICE BREYER: All right. So your words
7 would be, because they have introduced what we'd say as,
8 the defense has introduced an argument, that even if
9 it's proper for the introduction of the government's
10 expert witnesses under the Fifth Amendment, it still
11 cannot be beyond -- go beyond what is -- what's your
12 exact word, "reasonably" --

13 MR. SCHMIDT: "Reasonably related" was the
14 phrase.

15 JUSTICE BREYER: -- reasonably related to
16 the defense of insanity that the defendant himself
17 raised, and then that would be an issue for the Kansas
18 court to decide.

19 MR. SCHMIDT: And on the facts here, Your
20 Honor, we think there are very good facts on both sides,
21 that I suspect this Court doesn't want to --

22 JUSTICE BREYER: Well, you'd bring up
23 arguments why this is okay, and they would bring up
24 arguments why it isn't reasonably related, and Kansas
25 would decide.

1 JUSTICE SOTOMAYOR: Can I go back to the
2 line drawing?

3 MR. SCHMIDT: I'm sorry?

4 JUSTICE SOTOMAYOR: Can I go back to the
5 line drawing?

6 MR. SCHMIDT: Yes, ma'am.

7 JUSTICE SOTOMAYOR: A question that some of
8 my colleagues have focused on, if we're to say that this
9 was not compelled speech, presumably, there'd be no
10 reason the government couldn't use this report, whether
11 or not the defendant put his or her mental state at
12 issue, because if it's not compelled, you could use it
13 as affirmative evidence, correct?

14 MR. SCHMIDT: If it is not constitutionally
15 impermissible in the nature of the compulsion, yes, Your
16 Honor.

17 JUSTICE SOTOMAYOR: Seems a somewhat --

18 JUSTICE ALITO: Why would that --

19 JUSTICE SOTOMAYOR: If I may finish?

20 JUSTICE ALITO: Yes, sure.

21 JUSTICE SOTOMAYOR: Assuming that I'm
22 troubled by that holding, then what's the line we draw
23 with respect to the question Justice Kennedy asked you
24 as to when it is permissible. You're saying, let's just
25 rule on the base. When the defendant puts on an expert,

1 we can rebut with an expert.

2 But the broader question of if he puts his
3 mental state at issue without an expert, could you do
4 it? Could you still put on his examination? I'm not
5 sure you've really answered that question --

6 MR. SCHMIDT: Yes.

7 JUSTICE SOTOMAYOR: -- which is how broadly
8 do we hold? There's a waiver whenever you put in your
9 mental state at issue, or is it a waiver only when you
10 use an expert, and then the government is free to
11 respond with a compelled statement?

12 MR. SCHMIDT: Yes, Justice Sotomayor. I
13 think, if the Court wishes to go beyond the rule that
14 we're requesting in that regard, I would suggest it
15 analyze the factors that were articulated by the Court
16 in the Murphy case in 1964. That would be the case
17 where the Court catalogued the values that are protected
18 by the Fifth Amendment prohibition on
19 self-incrimination -- mandatory self-incrimination.

20 JUSTICE GINSBURG: Isn't that an academic
21 question in this case? After all, this expert for the
22 government came in when the case was in the Federal
23 system. The Federal system has a rule that, when the
24 defense puts on an expert, the government can counter
25 it.

1 So the -- the limit would be -- I mean,
2 Kansas doesn't provide for this? The Federal Rules
3 provide for it in a very limited way. So to talk about
4 using it beyond the scope of the Federal rule seems to
5 me not the case that's before us.

6 MR. SCHMIDT: I believe it is not the case
7 before us, Your Honor. I believe we wouldn't want to
8 concede there are other circumstances where it might be
9 constitutionally permissible.

10 Mr. Chief Justice, with permission, I'd like
11 to reserve the balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Ms. Saharsky.

14 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONER

17 MS. SAHARSKY: Mr. Chief Justice, and may
18 it please the Court:

19 When a defendant puts his mental state at
20 issue through the testimony of an expert who's examined
21 him, the State may rebut that testimony with its own
22 expert who examined the defendant. The Fifth Amendment
23 does not allow a defendant to put on his side of the
24 story and then deprive the prosecution of any meaningful
25 chance to respond. And we think the close analogy here

1 is the situation where a defendant himself takes the
2 stand.

3 To the extent that the question -- the Court
4 has questions about scope of the government's ability to
5 respond, we think that those are answered, like the
6 General said, by the questions about when the defendant
7 takes the stand reasonably related to the subject matter
8 that the defense put on.

9 CHIEF JUSTICE ROBERTS: Even if -- even if
10 the defendant does not submit an expert of his own, but
11 simply puts his mental state in issue?

12 MS. SAHARSKY: I think that that's a
13 different case. The Court's cases -- Estelle, Buchanan,
14 Powell -- have addressed an expert-for-expert situation.
15 And the specific rationale there is that this mental
16 health opinion testimony is different in that you really
17 can't have an expert give an opinion without examining
18 the defendant.

19 If we're talking about the defendant's
20 testimony, you know, he's not qualified to be an expert.
21 He can give factual statements about what happened to
22 him and what was happening at the time of the crime, but
23 he's not giving an expert opinion. So, to us, it does
24 seem to be a different question about whether it's
25 really reasonable to have an expert to rebut that

1 testimony. The Court just doesn't need to decide that
2 question in this case.

3 There's also a second question that the
4 General alluded to, which is, if he makes factual
5 statements during his mental examination, the defendant,
6 and then also gets up on the stand at trial, testifies
7 and says something contrary -- you know, whether you
8 could use those for impeachment purposes, the court
9 didn't grant that question.

10 CHIEF JUSTICE ROBERTS: Why would it only be
11 for -- why would it only be for impeachment purposes?
12 It's directed at some statements that he said, which are
13 not going -- not terribly pertinent to the mental
14 diagnosis, but valuable evidence, and the defendant
15 takes the stand; can the government call -- here's this
16 person, he happens to be the doctor that took the -- the
17 examination, but he learned some things here that we
18 think are helpful.

19 MS. SAHARSKY: Well, I think this goes back
20 to the questions that Justice Alito started asking
21 about, which have to do with whether there is compulsion
22 here, if at all. This is a -- a unique situation in
23 that there is a court-ordered mental exam, but it only
24 happens as a result of the defendant's choice to give
25 the notice of putting on the defense, and then the

1 evidence for the exam, at least under the rules, never
2 comes in until he puts on his evidence first.

3 It's really a parity principle that the
4 Court recognized in Estelle and in Buchanan. In those
5 cases, we read them to -- for the Court to have said
6 that there is sufficient compulsion in the ordering of
7 the exam to raise Fifth Amendment questions.

8 But when the defendant opens the door, the
9 Fifth Amendment just doesn't give him any right to -- to
10 stop the prosecution from responding. But if the Court
11 wanted to find that there was no compulsion and these
12 statements could be used for any purposes, we think that
13 would be more than the Court said in those prior cases.

14 But this is a different situation in that it
15 is the defendant's choice that -- that affects whether
16 this is ever going to come in. This is not the type of
17 Portash-compelled testimony, where you're set before a
18 grand jury and have to either self-incriminate, be in
19 contempt, or commit perjury.

20 JUSTICE KAGAN: Ms. Saharsky --

21 JUSTICE ALITO: Isn't the question here
22 whether Rule 12.2 is constitutional? Everything that
23 was done here seems to me to have been done in
24 compliance with Rule 12.2 of the Federal Rules of
25 Criminal Procedure, so if there's -- insofar as the

1 taking of the statement is concerned, which I'm
2 suggesting is the issue and not the later introduction
3 in the Kansas court. Am I wrong on that?

4 MS. SAHARSKY: Well -- well, if the question
5 is, is Rule .12 constitutional, we think the answer is,
6 pretty clearly, yes. If you look at the way that that
7 rule has evolved, it's evolved in response to this
8 Court's decisions about the understanding of the Fifth
9 Amendment, that there's a like-for-like principle, that
10 when the defendant puts this in issue, that the State
11 can respond in kind.

12 The Kansas Supreme Court thought that there
13 was a separate issue because of the specific Kansas
14 rules. But as the General suggested -- you know,
15 those -- the Kansas rules may be a -- there may be a
16 Kansas problem that has a Kansas law solution, but
17 Federal constitutional law just doesn't depend on -- on
18 the State rules of evidence.

19 JUSTICE KAGAN: I'm wondering whether you
20 way overread the cases that you rely on because in all
21 of those cases what we were talking about was an
22 examination that had specifically requested by the
23 defendant. Now, here, that's not the case. The
24 defendant has asked for something and has opened the
25 door, conceivably.

1 But the examination that we're talking about
2 is one that the State has compelled and that the
3 defendant does not wish to undergo. That's a big
4 difference between this case and all the ones you rely
5 on.

6 MS. SAHARSKY: That's a factual difference
7 from, for example, Buchanan and Powell. But we think
8 the key principle is the one that comes through in the
9 Court's cases that, if the defendant opens the door, the
10 State can respond. And we think that the Court -- that
11 the Court repeated that principle numerous times. In
12 Buchanan, it said, on page 425 of the decision, defense
13 counsel is on notice that, if you open the door, the
14 government can rebut.

15 And it's actually interesting. I think
16 every member of the Court understood, although it wasn't
17 clear from the majority opinion, that that could mean a
18 separate examination. And I would point the Court to
19 Justice Marshall's dissent, footnote 5, where he says,
20 "Of course, you could have your own separate
21 examination."

22 JUSTICE SCALIA: It seems to me --

23 JUSTICE KAGAN: Not to belabor this, but
24 the -- the holding of the case is that the prosecution
25 may rebut this presentation with evidence from the

1 reports of the examination that the defendant's
2 requested.

3 MS. SAHARSKY: Right. That -- that was the
4 specific holding based on the facts of that case, but
5 because the Court --

6 JUSTICE KAGAN: I mean -- I guess the
7 question is that you say it's a factual difference; it
8 might be a factual difference between compulsion and
9 lack of compulsion.

10 MS. SAHARSKY: Okay. And if the Court wants
11 to say that there is sufficient compulsion here in the
12 ordering of the mental state exam, despite the fact that
13 there was the initial choice by the defendant, we would
14 say the defendant's choice at trial to put on his
15 testimony is what makes this -- this evidence available
16 to the government to use in rebuttal.

17 So it's fine that Buchanan does not decide
18 the exact facts of this case. You could say that the
19 holding does not decide this case, but we think it comes
20 pretty darn close because the Court's rationale was
21 whether the defendant opened the door. It said, again
22 and again, did the defendant open the door, and if he
23 does, the State needs this evidence to have any
24 effective means of rebuttal.

25 JUSTICE SCALIA: Well, wait. I mean, all

1 the State -- I think it oversimplifies it to say that
2 when -- when the defendant puts it at issue, the
3 government can respond. Yes, the government -- the
4 government can respond with whatever evidence it has,
5 but the issue here is not whether the government can
6 respond.

7 The issue is whether the government can
8 compel the defendant to undergo a psychiatric
9 examination. That's -- that's quite a different issue
10 really from whether the government can respond. Of
11 course it can respond.

12 MS. SAHARSKY: That's right. The rule that
13 we've -- we're asking this Court to adopt is -- you
14 know, the same one that we think was at least hinted at
15 in the decisions in -- in *Estelle v. Smith* and in
16 *Buchanan*, which is when the defense is putting on an
17 expert above his mental state that is testifying to an
18 opinion based on an examination, that the State also can
19 have its own expert that testifies as to mental state
20 based on an examination.

21 We think this is a unique situation. We
22 think that's all the Court needs to do to decide this
23 case. To put it simply --

24 JUSTICE SCALIA: More precisely, it's not
25 that the State can have its own expert. It's that the

1 State can compel the defendant to testify to an
2 expert -- can compel the defendant to speak to a
3 psychiatrist. That's really the issue, not -- not
4 whether the government can respond. Of course, it can
5 respond.

6 MS. SAHARSKY: Sure. The implication is
7 that the -- the State has the same access to the
8 defendant as the defense expert had because the State's
9 expert is unable to come up with an opinion without a
10 personal examination of the defendant. This was
11 explained very well in your decision for the plurality
12 of the D.C. Circuit in Byers, which is --

13 JUSTICE KAGAN: So is that a waiver theory?
14 Because Justice Scalia's opinion was not based on a
15 waiver theory. But my understanding of your brief was
16 that you were arguing about waiver, is that right? That
17 the -- the defendant here has waived the ability to say
18 that he's being compelled?

19 MS. SAHARSKY: We've called it a waiver by
20 the defendant's conduct for two reasons. One, that's
21 what this Court called it in Powell, when it was
22 describing its holding in Buchanan; two, that's what
23 this Court has called it -- and I'd point you to page 15
24 of the gray brief -- in the cases about what happens
25 when a defendant takes the stand, that, in the act of

1 taking the stand, he has waived his Fifth Amendment
2 rights.

3 But you don't have to call it a waiver. The
4 point is that the Fifth Amendment does not extend so far
5 as the defendant claims. It doesn't allow him to both
6 put on his side of the story and then claim that the
7 government can't have a chance for any meaningful
8 rebuttal.

9 So -- you know, we -- we really don't think
10 that that label matters. We think that the Byers D.C.
11 Circuit plurality, we think that the Pope decision that
12 was well before this Court's decision in Estelle by
13 then-Judge Blackmun, which said -- you know, call it
14 either way -- you know, the result is the same, which is
15 that this evidence can come in.

16 JUSTICE GINSBURG: Are you suggesting that
17 the government can answer in -- in a like manner as the
18 defendant? The defendant opens the door by experts,
19 then the government can call experts? That is not to
20 say that a defendant simply offers his own testimony,
21 the government can do something that -- that the defense
22 has not opened the door to.

23 MS. SAHARSKY: That's right. The State has
24 an expert who examined -- the defense has an expert who
25 examined the defendant; the State can use an expert who

1 examined the defendant. It's a parity principle there.
2 It's a different question about trying to rebut or
3 impeach the defendant's own statements.

4 JUSTICE SOTOMAYOR: Well, I'm presuming that
5 if a defendant takes the stand and says something
6 completely contrary to what he tells a government
7 psychiatrist, that you would rely on the Brown line of
8 cases, that you could cross-examine him on the contrary
9 statement to the psychiatrist.

10 MS. SAHARSKY: Again, we think that's the
11 second question presented that the court didn't grant,
12 but there are good arguments for why the defendant, once
13 he opens the door, should not be able to slam it shut.
14 Also, we think this Court's cases, like Ventriss, that
15 have to do with the recent cases on impeachment, would
16 go to this.

17 Now, there's a question about whether it's a
18 difference that it's the defendant's own statements, as
19 opposed to an expert's opinion, based on his statement.

20 JUSTICE SOTOMAYOR: Well, that would be a
21 different issue. I'm just talking about whatever
22 statements he made. But don't -- the light is on.

23 CHIEF JUSTICE ROBERTS: Counsel, your time
24 has expired.

25 MS. SAHARSKY: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Katyal.

2 ORAL ARGUMENT OF NEAL KATYAL

3 ON BEHALF OF THE RESPONDENT

4 MR. KATYAL: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 The State is trying to use Scott Cheever's
7 words to execute him. That's wrong for many reasons,
8 but the simplest one is that, whatever the scope of the
9 Fifth Amendment waiver may be in this case, the
10 prosecution here exceeded it. Scott Cheever's words
11 were uttered in the context of an uncounseled,
12 un-Mirandized, 5-1/2 hour jail exam that the State made
13 him undergo as the price for putting on his voluntary
14 intoxication defense.

15 JUSTICE GINSBURG: Mr. Katyal, if this had
16 played out entirely in the Federal court, the
17 examination of the defendant was pursuant to Federal
18 Rule 12.2. Your argument seems to be that Rule 12.2
19 violates the Fifth Amendment. I mean, the mental
20 examination was ordered in the Federal court after the
21 defendant said, I am going to put on a couple of
22 witnesses -- expert witnesses, to testify to my mental
23 state.

24 Rule 12.2 says, when a defendant does that,
25 then the government has the right to have the defendant

1 examined by its expert. So the broad argument that
2 you're making seems to lead inevitably to the conclusion
3 that Rule 12.2 is unconstitutional.

4 MR. KATYAL: Your Honor, we think that
5 that's partially right. That is, our argument
6 ultimately does invalidate a small part of the
7 application of 12.2(d), and for that reason, we think
8 that the Court should avoid that constitutional question
9 by focusing on the scope question, which is a federal
10 Fifth Amendment question, Justice Scalia, not one of
11 Kansas law.

12 And if I could walk you through our 12.2
13 thinking, 12.2(d) excludes testimony from the defense
14 expert, or it may. It's permissive. And so to the
15 extent that a trial judge -- a Federal judge, excluded
16 evidence that the defendant wanted to put on because he
17 didn't -- because he didn't submit to the exam or the
18 like, we do think that that application would be
19 violated.

20 JUSTICE ALITO: That would be -- that's not
21 a -- that's not a self-incrimination question, though,
22 isn't it? It's a due process question. It's an
23 unreasonable limitation on the defendant's ability to
24 put on a defense.

25 MR. KATYAL: Your Honor, it's the clash

1 between -- it's just like Simmons. It's the clash
2 between two different constitutional rights, the right
3 to put on an effective defense on the one hand or the
4 right that is -- the right of self-incrimination on the
5 other. And it's that choice, Your Honor, which we find
6 makes the compulsion necessary -- compulsion --

7 JUSTICE ALITO: No, but there wouldn't be at
8 that point -- suppose the Federal rules simply said you
9 can't have an expert testify about mental condition,
10 period. That's a -- that raises a due process issue,
11 and maybe there would be a serious due process question
12 involved.

13 MR. KATYAL: Quite --

14 JUSTICE ALITO: Okay.

15 MR. KATYAL: Quite right.

16 JUSTICE ALITO: Up to that point, we're not
17 quite at the Fifth Amendment.

18 MR. KATYAL: Quite right, Your Honor. But
19 when a State like Kansas offers the voluntary
20 intoxication defense -- makes it part of the State's
21 burden to prove as an element of the offense and then
22 conditions that by saying, well, if you put that
23 evidence on, you then have to pay the price, submit to a
24 5-1/2 hour, uncounseled, un-Mirandized investigation
25 that goes far beyond what the voluntary intoxication

1 is --

2 JUSTICE BREYER: You're - you're -- the
3 State admits that all that they could put on was
4 information from the psychiatrist that is reasonably
5 related to the defense that the defendant raised. Do
6 you disagree with that?

7 MR. KATYAL: No. We -- Your Honor, we
8 agree, and we think that this case, obviously --

9 JUSTICE BREYER: All right. Then we both
10 agree --

11 MR. KATYAL: We agree on the legal standard.

12 JUSTICE BREYER: Fine. You both agree that
13 the test is "reasonably related." So we could simply
14 say that. They both agree.

15 MR. KATYAL: And that's what we think you
16 should say, Your Honor.

17 JUSTICE BREYER: And now, we send it back to
18 the Kansas court and say, we are not going to go through
19 the record here because you should do it.

20 MR. KATYAL: That's precisely right, Justice
21 Breyer. Both sides are agreeing on the legal standard.

22 JUSTICE BREYER: Then why are we here?
23 Everybody agrees.

24 MR. KATYAL: Well, that is -- that is,
25 ultimately, what we think -- and it avoids the

1 constitutional question by doing that. And this case
2 has never -- this Court has never squarely held that the
3 legal proposition that both sides are now in agreement
4 on --

5 JUSTICE SCALIA: But Kansas decided the
6 constitutional question, and we can't send it back
7 unless we reverse the Supreme Court of Kansas. So you
8 say we're going to dodge the constitutional question?
9 How can we? I think it has been decided by the Kansas
10 Supreme Court.

11 MR. KATYAL: Your Honor, I think you can
12 vacate the decision of the Kansas Supreme Court and
13 remand for them to look at whether or not --

14 JUSTICE SCALIA: On what basis can we
15 vacate? We can't vacate a decision, unless there's
16 something wrong with it. What's wrong with it?

17 MR. KATYAL: Well, that it -- that it
18 reached to ultimately decide this constitutional
19 question on 12.2 that it didn't have to --

20 JUSTICE SCALIA: That's -- that's error? I
21 mean, I understand it's general policy you don't reach a
22 constitutional question unless you have to, but I've
23 never heard of the proposition that, if a court
24 unnecessarily reaches a constitutional question, it can
25 be reversed, that we can send it back and say, don't

1 reach the constitutional question.

2 MR. KATYAL: Your Honor, I certainly think
3 that's available to you, particularly in the context of
4 this case, in which there is such an interrelationship
5 between the scope issue and the ultimate merits question
6 of the Fifth Amendment.

7 JUSTICE GINSBURG: But this --

8 JUSTICE SCALIA: I don't think so. Kansas
9 decided the constitutional question. We took the case
10 in order to decide that, and I think we have to decide
11 it.

12 MR. KATYAL: Well, Justice Scalia, if I
13 could just try -- try -- if you look at even Kansas's
14 opening brief at page 9, at page 12, at page 40, at page
15 42, it's all about the scope question. That's their
16 opening brief. And so we think that they are integrally
17 bound up. Be that as it may, it might not --

18 JUSTICE GINSBURG: But the scope question
19 wasn't decided by the Kansas court, and they wouldn't
20 get to it, unless they held that, yes, you can have this
21 rebuttal testimony. Then the next question is, if you
22 can have it, how far it can go?

23 But the anterior question, can you have it
24 at all, is the question the Kansas Supreme Court
25 answered, no, you cannot have it. And we can't send it

1 back to them without -- I mean, if -- if you can't have
2 it at all, then it's irrelevant that the scope was too
3 broad.

4 MR. KATYAL: That's quite right. Our
5 broadest position -- and we think the one that -- that
6 also disposes of this case, is the idea, as Justice
7 Scalia was saying to my colleague on the other side,
8 that what's at issue here is not whether or not the
9 State -- whether or not the State can follow where the
10 defense has led, but rather how can they follow.

11 And here, the State is doing something that
12 there is literally -- that this Court has never squarely
13 authorized.

14 JUSTICE GINSBURG: Mr. Katyal, would you --
15 you said, in answer to my question, that Federal Rule of
16 Criminal Procedure 12.2 violates the Fifth Amendment in
17 small part. Can you be explicit? The rule, as I
18 understand it, says if the defendant is going to
19 introduce evidence concerning his mental state, then the
20 government has a right to have the government's expert
21 examine the defendant and rebut what the defendant's
22 experts say.

23 That's what the rule is. And then it says,
24 you can't go beyond the scope of that issue -- of the
25 mental state.

1 MR. KATYAL: I think that's mostly right.
2 I'd like to be a little bit -- break down the rule a
3 little bit. 12.2(d) has the provision which says that
4 if you -- that the price of not submitting to the exam
5 is the exclusion of the defense expert, so we think
6 that -- it's a permissive rule, but if it's applied, we
7 think that's unconstitutional.

8 There are other points of 12.2 which don't
9 raise --

10 JUSTICE GINSBURG: You think it's
11 unconstitutional to say to the defendant, you have a
12 choice; if you introduce this testimony, then the
13 government can follow where you have led; if you don't
14 introduce the testimony, then of course, the government
15 has nothing to rebut?

16 MR. KATYAL: I don't think that's what
17 12.2(c)(4) says. Rather, what 12.2(c)(4) says is
18 that -- that the State can introduce expert testimony on
19 an issue regarding mental condition on which the
20 defendant has introduced evidence.

21 JUSTICE GINSBURG: Yes.

22 MR. KATYAL: And it's not clear to me
23 whether or not that's talking about a Buchanan
24 situation, one in which the defense has requested the
25 exam or not.

1 JUSTICE GINSBURG: It says, "on which the
2 defendant has introduced evidence." The evidence is the
3 defendant's expert.

4 MR. KATYAL: Exactly. And so to the extent,
5 Your Honor, that it's used to -- to introduce, as it was
6 in this case, evidence that -- that the defendant's own
7 words against him, yes, we think that 12.2 raises a deep
8 constitutional question, something which this Court has
9 never --

10 JUSTICE SCALIA: Of course, there is nothing
11 unusual about saying, if the defendant introduces
12 certain evidence, he has to forfeit some of his Fifth
13 Amendment self-incrimination rights.

14 MR. KATYAL: Absolutely.

15 JUSTICE SCALIA: It happens every time the
16 defendant chooses to testify.

17 MR. KATYAL: Absolutely, Justice Scalia.

18 JUSTICE SCALIA: He need not testify, but if
19 he introduces that evidence, he must submit to
20 cross-examination and has to incriminate himself. And
21 this is, it seems to me, quite similar. He need not
22 introduce the evidence of the psychiatrist, but if he
23 does, he has to forfeit his Fifth Amendment right not to
24 talk to a psychiatrist.

25 MR. KATYAL: Well, we agree with the first

1 75 percent of that; that is, that, certainly, it's the
2 case that when the defendant takes the stand, they are
3 subject to cross-examination. Cheever took the stand.
4 He is subject to cross-examination. Cheever's expert
5 takes the stand, Evans. He is subject to
6 cross-examination.

7 But the question here is whether or not the
8 State can go further and force someone to submit to a
9 mental health evaluation and use that against them.

10 JUSTICE SCALIA: I understand that. But
11 it's still -- it's still the same -- the same
12 correlative system playing --

13 MR. KATYAL: No, it --

14 JUSTICE SCALIA: That the defendant does one
15 thing, he has to accept what goes along with it, and
16 that includes waiving or forfeiting his -- his right not
17 to incriminate himself.

18 MR. KATYAL: I don't think so. I don't
19 think that's how it plays out. So, for example, if this
20 were an accounting case -- a criminal accounting case,
21 and the defendant had talked to -- the CEO of the
22 company had talked to an accounting expert, walked them
23 through all the books and so on and said, here's what
24 happened, and so on, and the expert took the stand, I
25 don't think the state could then force their expert to

1 talk to the defendant and have that evidence introduced
2 against the defendant.

3 JUSTICE SCALIA: That's not getting into the
4 defendant's mind.

5 MR. KATYAL: Oh, I think that cuts the other
6 way.

7 JUSTICE SCALIA: It's only the psychiatrist
8 who can get into the defendant's mind when he is -- when
9 he is raising a mental capacity defense.

10 MR. KATYAL: And, Justice Scalia, that
11 precisely cuts the other way. This Court, in *Couch v.*
12 *United States*, said that's the heart of what the Fifth
13 Amendment is about, the intrusion into a defendant's
14 mind, and here, this case is a perfect illustration of
15 that.

16 CHIEF JUSTICE ROBERTS: It's just the fact
17 that the evidence here is based on the defendant's
18 statements. If you had a physical object, you wouldn't
19 say it's the -- the murder weapon. You wouldn't say
20 that, if the defendant submits a study about the murder
21 weapon, the ballistics, this and that, you wouldn't say,
22 well, all the government can do is cross-examine the
23 defendant's expert. You say, no, they get to do their
24 own study.

25 The reality of what makes this different is

1 that here, when you're submitting and preparing
2 psychiatric evidence, it's based on -- the ballistics
3 testing is statements from -- from the defendant, and it
4 seems to me unfair to say the defendant's expert has
5 access to that ballistics evidence, but the State does
6 not.

7 MR. KATYAL: Mr. Chief Justice, I think what
8 does the work in your ballistics example is precisely
9 that it isn't the defendant's own words; it's something
10 else, and so it's wholly outside of the Fifth Amendment.
11 What we are talking about here in this circumstance is
12 Scott Cheever's own words to the --

13 CHIEF JUSTICE ROBERTS: No. I understand
14 that. But it just so happens that the way you do the --
15 the testing on the evidence when you're talking about
16 psychiatric evidence is to ask questions of the
17 defendant. That's how you do it. That's the parallel
18 to whatever ballistics tests they do on the -- on the
19 firearm.

20 MR. KATYAL: Yes, but I think the Fifth
21 Amendment imposes a different value judgment of our
22 founders, based on this type of situation in which you
23 are peering into the defendant's mind. I think that's
24 what the language in *Couch v. United States* is all
25 about, that there is a difference between --

1 JUSTICE KENNEDY: Well, we're going -- we're
2 going right back -- the defense expert here peered into
3 his mind. It's set out in the appendix. It's confusing
4 because there's a doctor evidence and also an attorney
5 evidence.

6 MR. KATYAL: Exactly.

7 JUSTICE KENNEDY: But the -- the expert is
8 Dr. Evans. He peers into the defendant's mind.

9 Now, are -- is this case any different and
10 any better for you because it happened in State court?
11 Suppose everything here happened in the Federal court,
12 would you have a constitutional objection?

13 MR. KATYAL: We would have a constitutional
14 objection.

15 JUSTICE KENNEDY: And that constitutional
16 objection would be?

17 MR. KATYAL: Exactly what I was saying to
18 Justice Ginsburg, that this choice -- a Simons-like
19 choice was forced upon the defendant. He could either
20 put on his defense --

21 JUSTICE KENNEDY: So in your view -- in your
22 view, the defendant can be interviewed by his own
23 psychiatrist, but not by a prosecution psychiatrist?

24 MR. KATYAL: That -- that is correct, Your
25 Honor. But, of course, the State can cross-examine

1 our -- our psychiatrist and every word --

2 JUSTICE GINSBURG: Mr. Katyal, if that's
3 your position, then you must disagree with the D.C.
4 Circuit decision, which was already mentioned, United
5 States against Byers, which took the position that,
6 where the defendant leads, the government may follow.

7 For the very reason that the defense expert
8 has access to the defendant, you can't disarm the
9 government by saying, we're not going to let you have a
10 counter-expert. All you can do is cross-examine the
11 defendant's expert.

12 MR. KATYAL: We -- we do ultimately
13 disagree, Your Honor, with the bottom-line holding in
14 the Byers case that -- that yourself and Justice Scalia
15 was on. We think that that reasoning -- the way that
16 the Court got there was to say that there was a
17 policy-based reason under the Fifth Amendment that
18 allowed this. It wasn't waiver, which you've been
19 hearing about.

20 It was a policy-based reason. And frankly,
21 I think that, ultimately, this is a -- the governments'
22 argument, both governments, is an argument in search of
23 a theory. We've heard a bunch of different ones. We've
24 heard the Byers one about policy. We've heard Justice
25 Alito's question --

1 JUSTICE GINSBURG: I didn't know that it was
2 policy. I thought it was -- it was saying it is just
3 like the defendant gets on the stand; he's subject to
4 cross-examination. The defendant puts on experts; the
5 government must be treated equally, must be able to put
6 on its own experts.

7 And as far as waiver, that's a fiction,
8 isn't it? The defendant could say, 100 times, I'm going
9 to testify, but I'm not waiving my Fifth Amendment
10 privilege. It wouldn't matter if he said that 100
11 times. He will be exposed to cross-examination.

12 MR. KATYAL: But, Justice Ginsburg, we think
13 that Byers -- ultimately, the language, the way it got
14 there was purely policy. And we think that this Court
15 has, in the 30 years since Byers, really changed to the
16 game on the use of policy-based reasoning when it comes
17 to the Fifth Amendment.

18 JUSTICE KAGAN: Well, but if that's policy,
19 why isn't the -- the cross-examination analogy policy as
20 well? I mean, they are both based on some notion of
21 what is parity and what's reciprocity and what's -- you
22 know, what's appropriate to ask the defendant to bear
23 once the defendant decides to become a witness in a
24 proceeding.

25 So they are both the same kind of policy.

1 You want to call it that, but it's -- it's -- one is no
2 more policy than the other.

3 MR. KATYAL: I don't quite think that's
4 right. The text of the Fifth Amendment is that a
5 defendant can't be "compelled" to be a witness. And
6 once a defendant takes the stand and acts as a witness,
7 then it seems to me that is behavior inconsistent, as
8 *Berghuis v. Thompson* suggests, with the invocation of
9 the Fifth Amendment privilege.

10 JUSTICE KENNEDY: Can you give me the -- can
11 you give me the black letter formulation that you are
12 asking this Court to adopt? It violates the Fifth
13 Amendment when?

14 MR. KATYAL: When a defendant is forced to
15 undergo a psychological examination as the price for
16 putting on his mental state defense, at least -- at
17 least when it's an element to the defense. We don't
18 think you have to get into, as our brief explains,
19 affirmative defenses like the Federal defense --

20 JUSTICE SCALIA: When you say as the price
21 for putting on his defense, you mean as the price for
22 introducing the testimony of a psychological expert?

23 MR. KATYAL: That is correct, Justice
24 Scalia.

25 JUSTICE BREYER: The authority for that is

1 what?

2 MR. KATYAL: It's -- it's several cases, but
3 I think Simmons is the best case. Justice Harlan's
4 opinion for seven justices --

5 JUSTICE BREYER: Well, I mean -- you know,
6 the obvious, it's not a question of policy. But one
7 thing, the Fifth Amendment prevents you from being a
8 witness against yourself, you didn't take the stand. So
9 what you did was introduced three psychiatrists, and
10 they said, this man was totally insane, he could form no
11 will whatsoever, totally insane.

12 The government says, we have seven
13 psychiatrists who would like to examine this man, and
14 they'll come to the opposite conclusion. The judge
15 says, okay, examine him, under compulsory. And they say
16 he is totally sane. And they each have reasons.

17 Now, you're saying, in that case, the
18 government cannot put any of those seven on the stand?

19 MR. KATYAL: Oh, disagree entirely.

20 JUSTICE BREYER: Really?

21 MR. KATYAL: The government can put experts
22 on, psychiatric experts, but they can't put on --

23 JUSTICE BREYER: No, but they -- they can
24 base their testimony on an examination compelled by
25 the --

1 MR. KATYAL: That's the problem, absolutely.

2 JUSTICE BREYER: All right. So you --

3 MR. KATYAL: And that is wholly foreign --

4 JUSTICE BREYER: But that -- that puts the
5 government in a -- in an impossible position. The
6 defense is allowed witnesses who've examined the
7 defendant and -- oh, you mean you're only limiting it to
8 the case where the defense witnesses don't examine the
9 defendant?

10 MR. KATYAL: I'm saying that -- that in a
11 circumstance -- that, either way, if it's the price for
12 putting on the defense, then, yes, it's
13 unconstitutional.

14 JUSTICE BREYER: You're -- I'm giving you a
15 hypothetical.

16 MR. KATYAL: I don't think --

17 JUSTICE BREYER: Psychiatrist A, hired by
18 the defense, examines the witness. He says he is
19 totally mad. All right? That's his conclusion based on
20 the examination. Psychiatrist B, who works for the
21 government, has examined the witness under compulsion.
22 All right? And he's done it under the authority of 12.2
23 because the defendant, just as here, made a 12.2 motion
24 and said that this was a -- all right, just like here.

25 He examines him. He comes to the conclusion

1 this man is as sane as -- whatever the most sane thing
2 is. All right.

3 (Laughter.)

4 JUSTICE BREYER: That's his conclusion.

5 You're saying the government can put on its
6 witnesses, but the Fifth Amendment prohibits the --
7 sorry, the defense can put on its witness, but the --
8 the Fifth Amendment prohibits the defendant from putting
9 on its own witness?

10 MR. KATYAL: No. The Fifth Amendment
11 prohibits --

12 JUSTICE BREYER: That means it's
13 something -- I can't imagine how the Fifth Amendment can
14 say that. But go ahead.

15 MR. KATYAL: That is not our argument.

16 JUSTICE BREYER: What is your argument?

17 MR. KATYAL: The prosecution can still put
18 on an expert witness; they just can't --

19 JUSTICE BREYER: No, no. They put on my
20 witness, my imaginary psychiatrist A.

21 MR. KATYAL: Your imaginary psychiatrist
22 can't be put on under our system and, indeed, under
23 Kansas's own system, Justice Breyer.

24 JUSTICE BREYER: Well, that may be, but does
25 the Federal Constitution -- it's my example. It's my

1 example.

2 MR. KATYAL: I think it does.

3 JUSTICE BREYER: Because --

4 MR. KATYAL: This Court has never once
5 accepted the idea that a -- that the government can
6 force someone to talk to your psychiatrist B and
7 introduce his own words against him. That's what the
8 Fifth Amendment is about, and I understand, sure, the
9 government isn't going to have the evidence that it
10 wants.

11 It's going to be the price of the Fifth
12 Amendment. That's what it --

13 JUSTICE ALITO: Well, suppose we -- suppose
14 we agree with you, and the response is the adoption of a
15 new Federal rule of evidence or a State rule of evidence
16 that says that evidence of a -- that an expert who
17 testifies for the defense as to the mental -- the
18 insanity or mental state of a defendant is very
19 unreliable, if there has not been an opportunity for the
20 defendant to be examined by another expert and,
21 therefore, is just inadmissible. You can't do it at
22 all.

23 Would there be a constitutional problem with
24 that?

25 MR. KATYAL: If it's -- it's simply a rule

1 of evidence that doesn't condition one right against the
2 other, no, I don't think so. It would go back to your
3 earlier question --

4 JUSTICE BREYER: What do we do with this?
5 The defense says, my defense will consist of the fact
6 demonstrated by an expert that my heart is too weak to
7 have made it up the stairs. All right. And I have
8 Mister -- Dr. Smith, who has examined my heart, and he
9 will testify it's impossible I could have been on the
10 third floor, I would have been dead.

11 So the government says, we would like to
12 have you examined by our doctor, Dr. B, who we believe
13 will -- and the judge orders it. All right. So now,
14 Dr. B says, his heart is sound as an ox, and he goes to
15 it. You're saying the government could not put that
16 Dr. B on the stand?

17 MR. KATYAL: I think that's right, Justice
18 Breyer. The idea that the government can force someone
19 to undergo a mental -- or, excuse me, a physical
20 evaluation and maybe extract stuff from their body as
21 the price for putting on a defense, yeah, I think that
22 raises some Fifth Amendment questions --

23 JUSTICE SOTOMAYOR: Mr. Katyal, assuming the
24 incredulity of my colleagues continues with your
25 argument, which way would you rather lose?

1 (Laughter.)

2 JUSTICE SOTOMAYOR: On a waiver theory or on
3 a lack of compulsion theory? And pick one and tell us
4 the reason why that's preferable to the other.

5 MR. KATYAL: Well, certainly, I think lack
6 of compulsion is not something that really is being
7 advanced by the government in this case. Even their
8 opening lines of their oral argument are focusing on
9 waiver, not that. And I think it would raise any number
10 of concerns, like the ones you suggested, to go on a
11 compulsion theory, that it would allow introduction of
12 evidence, even if the defendant hasn't led in that
13 direction.

14 But I would like to try and take another
15 shot at persuading your colleagues --

16 JUSTICE KAGAN: Mr. Katyal, could I go back
17 to the cross-examination analogy? Because you say your
18 case is different, but I think you'll have to explain
19 that one to me. It seems to me that the
20 cross-examination cases say you can't become a witness
21 halfway. Once you've decided to become a witness, you
22 have to subject yourself to all the things that every
23 other witness is subjected to.

24 And it seems to me that you haven't
25 convinced me that the same point isn't true here, that

1 the person, Mr. Cheever, has decided to become a
2 witness, essentially, by giving an interview to his own
3 expert and allowing his own expert to speak about what
4 Mr. Cheever has told him. And so -- you know, he can't
5 do it halfway. Now, the government has to get its shot.
6 Same way.

7 MR. KATYAL: I don't quite think that the
8 cross-examination cases go so far as to say that it
9 leads to the same way and gets you so far as to say that
10 if someone testifies by -- if an expert testifies using
11 the defendant's own words, that that opens the door to
12 the prosecution doing so.

13 There is something unique about the Fifth
14 Amendment, and the idea that the government can peer
15 into someone's mind and extract information out of them
16 in an uncounseled, un-Mirandized 5-1/2 hour session, and
17 have that used against them at trial. And the price
18 that Cheever paid here was an extraordinary one.

19 He put on a defense that has been a defense
20 for hundreds of years, the idea of voluntary
21 intoxication, and he was told the cost of doing that was
22 that this exam took place and all of this evidence
23 ranging about outlaws and so on was introduced --

24 JUSTICE KENNEDY: Well, that's something of
25 an overstatement because he also had the psychiatrist

1 who testified that, in his expert opinion, he did not
2 have the requisite mental state, and he -- and he
3 prefaced that by indicating how many people he had
4 examined that had used meth and there was neurotoxicity,
5 so this defense expert did testify to that.

6 MR. KATYAL: Well, he certainly testified
7 to --

8 JUSTICE KENNEDY: So I think you quite
9 overstate when you say the fact the defendant testified.

10 MR. KATYAL: Well, what the defense expert
11 testified to, voluntary incapacitation under
12 methamphetamine, and, certainly, the prosecution expert
13 did that as well, but then the prosecution expert went a
14 lot further to talk about his -- it's a suggested
15 anti-social personality disorder, to suggest outlaws,
16 and the outlaws evidence was introduced by the State
17 first in the context of direct.

18 JUSTICE SOTOMAYOR: But that's scope issues.
19 That's not right issues.

20 MR. KATYAL: Right, but I think it does bear
21 on when you think about whether the Simmons analogy
22 makes sense, whether or not forcing a defendant as the
23 price of the defense to open the door to all of this
24 evidence being introduced against him, that is not
25 really a choice at all. That is ultimately --

1 JUSTICE GINSBURG: Mr. Katyal, you have
2 conceded, I think, in response to Justice Alito's
3 question, that the rules could be changed to say,
4 defendant, you cannot put on these experts. So how does
5 that maybe help defendants who want to put on a defense
6 of mental state? You can't put it on, unless the
7 government can put it on. That's the current rule.

8 But you're saying the response to it can be
9 this evidence is shut out entirely. The government --
10 the government will have nothing to answer if the
11 defendant doesn't put on experts. I'm not so sure that
12 would be a rule that defense counsel would put on.

13 MR. KATYAL: I'm not sure that they would
14 favor it or not. Our argument is simply that, when a
15 state such as Kansas recognizes the voluntary
16 intoxication defense and doesn't have all these witness
17 rules, that Cheever is entitled to put on that effective
18 defense and not have that right to flash against his
19 Fifth Amendment right.

20 And, indeed, the fact that the State has all
21 sorts of options available to it like expert -- like
22 expert evidentiary rules or even abolishing the
23 involuntary intoxication defense altogether is the true
24 answer to the policy concerns, not trying to jigger into
25 the Fifth Amendment, somehow some exception that allows

1 for psychiatric exams by criminal defendants.

2 JUSTICE SCALIA: I'll bet you the
3 prosecution would accept your alternative in a
4 heartbeat.

5 (Laughter.)

6 JUSTICE SCALIA: No defendant can introduce
7 any psychiatric evidence. That's a good deal for the
8 prosecution.

9 MR. KATYAL: It may be. It may not be.
10 That's something the legislature would hammer out, but I
11 think that's where the policy objection --

12 JUSTICE GINSBURG: What do you need to
13 hammer out? You said that the rule now is no good
14 because it allows government psychiatrists to have
15 access to the defendant -- compelled access. That rule
16 is no good, but the alternative of not allowing this
17 evidence at all, what is there to hammer out?

18 MR. KATYAL: We think that, if the Court
19 follows our rule, which suggests that you can't put the
20 defendant to this choice, the State has the option of
21 modifying the voluntary intoxication defense, possibly
22 making it an affirmative defense or putting restrictions
23 on experts, any number of things that may be possible in
24 that circumstance or the legislative process, not
25 through some Fifth Amendment interpretation of this

1 Court, to try and deal with a policy concern.

2 JUSTICE GINSBURG: Is there really a huge
3 difference between mental state as an element of the
4 defense and mental state as an affirmative defense? I
5 mean, in reality, doesn't -- doesn't the mental state
6 argument of the defendant function as an affirmative
7 defense to premeditated murder?

8 Government has the burden of proof on mental
9 state, but it -- it operates, as far as a defendant is
10 concerned, if the defendant is able to show this
11 voluntary intoxication, that would be a defense to
12 premeditated murder.

13 MR. KATYAL: No, Your Honor, our brief at
14 page 36 points out that, under Kansas law, it's an
15 element of the offense, they carry the burden of proof.
16 In the Sixth Circuit decision in United States v. Davis,
17 I think, explains that in a circumstance like this --
18 like involuntary intoxication, the defendant is not
19 interjecting some new issue into the trial.

20 The defendant is simply rebutting the
21 premeditation argument, which is their burden to prove.
22 And if you accept their argument here, you're
23 essentially saying that the defendant's own words can be
24 used by the State to shoulder the load against him. And
25 that is something foreign to the Fifth Amendment.

1 It may be something you want to do for
2 policy reasons, I understand that, but it is not
3 something this Court has ever accepted.

4 If there are no other questions?

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Katyal.

7 General Schmidt, you have four minutes
8 remaining.

9 REBUTTAL ARGUMENT OF DEREK SCHMIDT

10 ON BEHALF OF THE PETITIONER

11 MR. SCHMIDT: Thank you, Mr. Chief Justice.

12 I would just like to refocus on what has
13 happened in this case. The Kansas Supreme Court
14 interpreted -- or we believe misinterpreted the Fifth
15 Amendment to say that, once the defendant had put his
16 own expert on the stand to testify in support of his
17 mental health claim after this expert had examined the
18 defendant, the government couldn't respond in kind. And
19 it's that bar on our participating in the factfinding in
20 front of the jury that we are seeking to have overturned
21 here.

22 JUSTICE BREYER: I think what he's saying is
23 that, look, in Simmons, there is a Fourth Amendment
24 problem, and the defendant wants to testify in a Fourth
25 Amendment hearing. And if he does, the State will take

1 that statement and use it at the trial.

2 So because of the reasons -- I'd say the
3 policies underlying the Fourth Amendment, the court
4 says, that's wrong. He can go testify at the
5 suppression hearing, and then they can't use his
6 statement later. So by analogy, he says, it's a similar
7 situation. He says, it's the policy behind the Fifth
8 Amendment that says, if you're going to go see the
9 government under compulsion -- the psychiatrist, you
10 shouldn't be able to introduce that later.

11 I mean, I think that's, in my looking at
12 them -- because I'm trying to see if I got the argument
13 basically right, which is what I wanted to find out, and
14 now, what's the response to that particular argument?

15 MR. SCHMIDT: I think, Your Honor, the
16 Simmons circumstance is not applicable here, and, in
17 fact, the Court would have to substantially expand
18 Simmons in order to find it to fit these facts.

19 JUSTICE BREYER: You'd have to say then
20 there's difference between the Fifth Amendment and the
21 Fourth Amendment, and that difference would be what?

22 MR. SCHMIDT: Well, Your Honor, in the
23 Simmons case, what the government sought to do was to
24 take the defendant's unvarnished statements from the
25 prior hearing and to introduce them without the

1 defendant having put those issues into the fact-finding
2 portion of the trial as affirmative evidence in the
3 government's case-in-chief. In that regard, it is much
4 more like Smith on its facts, where the court said, even
5 in the circumstances we're confronted with here, on
6 those facts, we can't do it.

7 The court specifically said later, in the
8 Salvucci case, that it hadn't addressed the question in
9 Simmons as to whether or not the government could use
10 that evidence from the suppression hearing for
11 impeachment purposes, which is much more analogous here.

12 So it's an open question, even under
13 Simmons, even if it applied, and the Court would have to
14 extend it in that regard. The Court, I would suggest,
15 shouldn't extend Simmons in that regard because, at the
16 end of the day, the other differing -- different factor
17 here -- and it goes to the line of question that started
18 earlier -- is that there is something different, as the
19 Court has repeatedly emphasized, in the nature that --
20 the actual nature of use and obtaining of mental health
21 evidence. That's the ink that fires.

22 CHIEF JUSTICE ROBERTS: What if -- what
23 happens if the defendant is going through this
24 examination, they ask him this, he tells them this,
25 that, and all of a sudden, they ask him a question, he

1 said, I'd rather not answer that. I mean, is he
2 allowed -- allowed to do that?

3 MR. SCHMIDT: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: Why? Because it
5 might incriminate me?

6 MR. SCHMIDT: In fact, on the record here,
7 the government's expert, Dr. Welner, specifically
8 advised the Respondent, before the examination began,
9 that if at any point he wanted to terminate the
10 examination, he was free to do so. So I think yes.

11 CHIEF JUSTICE ROBERTS: That's a little bit
12 different. I understand terminate, then they'd say,
13 well, look, you don't get to put your expert in. But
14 what if it's just -- you know, particular questions?
15 What happens then?

16 MR. SCHMIDT: Well, on -- on particular
17 questions, I suppose the Respondent could invoke at that
18 time. But more importantly, before any of that could be
19 introduced at trial, there would be a report generated
20 by the expert, and all counsel, including the
21 Respondent's counsel, would have ability to review it
22 and seek some sort of pretrial order to keep out any
23 particularly offensive materials.

24 There are mechanisms to resolve any problems
25 like that, that might arise.

1 JUSTICE SOTOMAYOR: I'm not quite sure I
2 understand why we shouldn't follow the Simmons analogy
3 because, as I understand it, we haven't ruled on the
4 last question of whether you can use the compelled
5 statements as impeachment. But if we assume that to be
6 the case, most circuits who have addressed the issue,
7 and I think it may be all of them, have said you can
8 because there's a waiver of your Fourth Amendment right
9 when you take the stand to impeachment.

10 Why couldn't we follow a similar reasoning
11 here, which is, you're compelled to -- I'm sorry.
12 Forget it. I can answer my own question.

13 CHIEF JUSTICE ROBERTS: Don't forget it.
14 Why don't you try a quick response?

15 (Laughter.)

16 MR. SCHMIDT: Thank you, Mr. Chief Justice.

17 Justice Sotomayor, I think the -- the key
18 difference in Simmons and the reason its reasoning
19 shouldn't be applied here is that the distinction we've
20 been drawing from the start of this case is that what we
21 want is a rule of parity. We want to be able to rebut
22 what the defendant himself put in issue in front of the
23 jury, and that's not Simmons.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 11:03 a.m., the case in the
2 above-entitled matter was submitted.)

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A	15:18,20 19:20 20:21 29:20 30:7,14,16 47:13 alitos 41:25 52:2 allegations 12:23 allegedly 10:13 allow 10:21 17:23 26:5 49:11 allowed 3:17 6:18 41:18 45:6 58:2,2 allowing 3:21 50:3 53:16 allows 4:12 52:25 53:14 alluded 19:4 alternative 53:3 53:16 alternatively 13:10 altogether 52:23 amendment 3:15 3:23 5:11 7:24 8:5 10:25 12:1 12:8,9,18 14:10 16:18 17:22 20:7,9 21:9 26:1,4 28:9,19 29:10 30:17 33:6 34:16 36:13,23 38:13 39:10,21 41:17 42:9,17 43:4,9 43:13 44:7 46:6 46:8,10,13 47:8 47:12 48:22 50:14 52:19,25 53:25 54:25 55:15,23,25 56:3,8,20,21 59:8 amicus 1:19 2:7 17:15	analogous 57:11 analogy 17:25 42:19 49:17 51:21 56:6 59:2 analyze 16:15 answer 21:5 26:17 34:15 52:10,24 58:1 59:12 answered 16:5 18:5 33:25 anterior 33:23 antisocial 51:15 anyway 12:6 appearances 1:14 appendix 40:3 applicable 56:16 application 29:7 29:18 applied 35:6 57:13 59:19 appropriate 5:14 42:22 argued 10:2 11:22 arguing 25:16 argument 1:12 2:2,5,9,12 3:3,6 3:12 14:8 17:14 28:2,18 29:1,5 41:22,22 46:15 46:16 48:25 49:8 52:14 54:6 54:21,22 55:9 56:12,14 arguments 14:23 14:24 27:12 articulated 16:15 asked 15:23 21:24 asking 4:10,11 5:2 19:20 24:13 43:12 aspects 12:25	assessment 4:4 assistant 1:17 assume 59:5 assuming 15:21 48:23 attorney 1:15 40:4 authority 43:25 45:22 authorized 34:13 available 23:15 33:3 52:21 avoid 3:15 29:8 avoids 31:25 awed 13:12	B b 45:20 47:6 48:12,14,16 back 10:11 11:4 15:1,4 19:19 31:17 32:6,25 34:1 40:2 48:2 49:16 bad 13:10 balance 17:11 ballistics 38:21 39:2,5,8,18 bar 10:1 12:10 55:19 barred 10:8 base 15:25 44:24 based 4:4 7:15 23:4 24:18,20 25:14 27:19 38:17 39:2,22 42:20 45:19 basically 56:13 basis 32:14 bear 42:22 51:20 began 58:8 behalf 1:16,21 2:4,11,14 3:7 28:3 55:10 behavior 43:7	belabor 22:23 believe 5:14 11:1 12:16 17:6,7 48:12 55:14 berghuis 43:8 best 44:3 bet 53:2 better 40:10 beyond 11:12 12:12 14:11,11 16:13 17:4 30:25 34:24 big 22:3 bit 35:2,3 58:11 black 43:11 blackmun 26:13 body 48:20 books 37:23 bottomline 41:13 bound 33:17 bounds 12:19 boys 13:11 break 35:2 breyer 13:2 14:1 14:6,15,22 31:2 31:9,12,17,21 31:22 43:25 44:5,20,23 45:2 45:4,14,17 46:4 46:12,16,19,23 46:24 47:3 48:4 48:18 55:22 56:19 brief 25:15,24 33:14,16 43:18 54:13 bring 14:22,23 broad 4:11 29:1 34:3 broader 5:1 16:2 broadest 34:5 broadly 13:18 16:7 brown 12:21 14:4 27:7
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buchanan 4:25 18:13 20:4 22:7 22:12 23:17 24:16 25:22 35:23	33:4,9 34:6 36:6 37:2,20,20 38:14 40:9 41:14 44:3,17 45:8 49:7,18 55:13 56:23 57:8 59:6,20,25 60:1	chooses 36:16 chose 10:24 circuit 25:12 26:11 41:4 54:16	completely 27:6 compliance 20:24 compulsion 7:19 8:8,14,22,24 9:10,24 10:8 15:15 19:21 20:6,11 23:8,9 23:11 30:6,6 45:21 49:3,6,11 56:9	29:8 30:2 32:1 32:6,8,18,22 32:24 33:1,9 36:8 40:12,13 40:15 47:23
bunch 41:23	55:13 56:23	circuits 59:6	9:10,24 10:8	constitutionally
burden 10:4 30:21 54:8,15 54:21	caseinchief 57:3	circumstance 8:11 39:11 45:11 53:24 54:17 56:16	15:15 19:21 20:6,11 23:8,9 23:11 30:6,6 45:21 49:3,6,11 56:9	10:6,8 15:14 17:9
byers 25:12 26:10 41:5,14 41:24 42:13,15	cases 3:20 8:9 18:13 20:5,13 21:20,21 22:9 25:24 27:8,14 27:15 44:2 49:20 50:8	circumstances 13:12 17:8 57:5	compulsory 44:15	contempt 20:19
C	catalogued 16:17	civil 12:15	concede 10:7 17:8	context 4:3 12:18 28:11 33:3 51:17
c 1:8,18,21 2:1 3:1 25:12 26:10 35:17,17 41:3	category 9:24	claim 3:14 26:6 55:17	conceded 52:2	continues 48:24
call 4:19 5:4 19:15 26:3,13 26:19 43:1	ceo 37:21	claims 26:5	conceivably 21:25	contrary 19:7 27:6,8
called 5:20,24 7:2,6 9:24 25:19,21,23	certain 13:12 36:12	clear 11:15 22:17 35:22	concern 4:16 54:1	convinced 49:25
cant 18:17 26:7 30:9 32:6,15 33:25 34:1,24 41:8 43:5 44:22 46:13,18,22 47:21 49:20 50:4 52:6 53:19 56:5 57:6	certainly 9:3 33:2 37:1 49:5 51:6,12	clearly 21:6	concerned 4:21 9:21 21:1 54:10	correct 7:6,9 8:20 9:11 12:17 15:13 40:24 43:23
capacity 4:18 7:15 38:9	cetera 13:25	close 17:25 23:20	concerning 34:19	correctly 6:13
carry 54:15	chance 17:25 26:7	closely 6:5	concerns 49:10 52:24	correlative 37:12
case 3:4 4:17 5:21 6:7,12,15 6:25 7:18 8:13 9:16 10:10,19 11:8,21 16:16 16:16,21,22 17:5,6 18:13 19:2 21:23 22:4 22:24 23:4,18 23:19 24:23 28:9 31:8 32:1	changed 42:15 52:3	closer 8:14	conclusion 3:20 29:2 44:14 45:19,25 46:4	cost 50:21
	cheever 1:6 3:4 37:3 50:1,4,18 52:17	colleague 34:7	condition 30:9 35:19 48:1	couch 38:11 39:24
	cheevers 28:6,10 37:4 39:12	colleagues 15:8 48:24 49:15	conditions 30:22	couldnt 15:10 55:18 59:10
	chief 3:3,8 17:10 17:12,17 18:9 19:10 27:23 28:1,4 38:16 39:7,13 55:5,11 57:22 58:4,11 59:13,16,24	come 11:19 20:16 25:9 26:15 44:14	conduct 25:20	counsel 22:13 27:23 52:12 58:20,21 59:24
	choice 10:5 19:24 20:15 23:13,14 30:5 35:12 40:18,19 51:25 53:20	comes 20:2 22:8 23:19 42:16 45:25	conducted 5:12	counter 16:24
		coming 10:11	confronted 57:5	counterexpert 41:10
		commit 20:19	confusing 40:3	couple 28:21
		committed 3:18	consist 48:5	course 4:5 5:3,11 11:21 22:20 24:11 25:4 35:14 36:10 40:25
		company 37:22	consistent 3:22 3:24	court 1:1,12 3:9 3:17 5:25 8:9 9:6 10:12,16,24 11:9,20,24 12:1 12:9,17 13:16 14:1,18,21
		compel 5:5 24:8 25:1,2	constitution 4:21 9:20 10:15 46:25	
		compelled 8:10 10:14 15:9,12 16:11 22:2 25:18 43:5 44:24 53:15 59:4,11	constitutional 3:18 9:17 10:1 12:19 14:3 20:22 21:5,17	

16:13,15,17 17:18 18:3 19:1 19:8 20:4,5,10 20:13 21:3,12 22:10,11,16,18 23:5,10 24:13 24:22 25:21,23 27:11 28:5,16 28:20 29:8 31:18 32:2,7,10 32:12,23 33:19 33:24 34:12 36:8 38:11 40:10,11 41:16 42:14 43:12 47:4 53:18 54:1 55:3,13 56:3,17 57:4,7,13,14 57:19 courtappointed 3:16 courtordered 6:23 7:8,20 19:23 courts 3:20,22 3:25 4:24 6:16 7:12 8:2 18:13 21:8 22:9 23:20 26:12 27:14 creating 12:10 crime 18:22 criminal 9:8 13:8 20:25 34:16 37:20 53:1 crosssexaminat... 8:18 12:12 36:20 37:3,4,6 42:4,11,19 49:17,20 50:8 crosssexamine 27:8 38:22 40:25 41:10 curiae 1:19 2:7 17:15 current 52:7	cuts 38:5,11 <hr/> D d 1:6,8,18,21 3:1 25:12 26:10 29:7,13 35:3 41:3 darn 23:20 davis 54:16 day 57:16 dead 48:10 deal 53:7 54:1 dealt 7:12 decide 11:5 14:18,25 19:1 23:17,19 24:22 32:18 33:10,10 decided 32:5,9 33:9,19 49:21 50:1 decides 42:23 decision 3:10 5:19 8:15 22:12 25:11 26:11,12 32:12,15 41:4 54:16 decisions 21:8 24:15 deep 36:7 defect 6:21 defendant 3:14 4:7,12,17 5:13 5:15,24 6:8,9 8:15 11:13 13:5 13:15 14:16 15:11,25 17:19 17:22,23 18:1,6 18:10,18 19:5 19:14 20:8 21:10,23,24 22:3,9 23:13,21 23:22 24:2,8 25:1,2,8,10,17 25:25 26:5,18 26:18,20,25	27:1,5,12 28:17 28:21,24,25 29:16 31:5 34:18,21 35:11 35:20 36:2,11 36:16 37:2,14 37:21 38:1,2,20 39:3,17 40:19 40:22 41:6,8 42:3,4,8,22,23 43:5,6,14 45:7 45:9,23 46:8 47:18,20 49:12 51:9,22 52:4,11 53:6,15,20 54:6 54:9,10,18,20 55:15,18,24 57:1,23 59:22 defendants 7:15 18:19 19:24 20:15 23:1,14 25:20 27:3,18 29:23 34:21 36:3,6 38:4,8 38:13,17,23 39:4,9,23 40:8 41:11 50:11 52:5 53:1 54:23 56:24 defense 6:21,21 7:7,13 10:22 11:17 13:18 14:8,16 16:24 18:8 19:25 22:12 24:16 25:8 26:21,24 28:14 29:13,24 30:3,20 31:5 34:10 35:5,24 38:9 40:2,20 41:7 43:16,17 43:19,21 45:6,8 45:12,18 46:7 47:17 48:5,5,21 50:19,19 51:5	51:10,23 52:5 52:12,16,18,23 53:21,22 54:4,4 54:7,11 defenses 43:19 demonstrated 48:6 department 1:18 depend 5:20 21:17 deprive 17:24 derek 1:15 2:3 2:13 3:6 55:9 described 13:10 describing 25:22 despite 23:12 determination 11:25 determine 11:10 diagnosis 19:14 didnt 7:10 10:15 10:16 19:9 27:11 29:17,17 32:19 42:1 44:8 difference 22:4,6 23:7,8 27:18 39:25 54:3 56:20,21 59:18 different 13:6 18:13,16,24 20:14 24:9 27:2 27:21 30:2 38:25 39:21 40:9 41:23 49:18 57:16,18 58:12 differing 57:16 direct 11:13 12:13 14:5 51:17 directed 19:12 direction 49:13 disagree 31:6 41:3,13 44:19 disagreement	7:11 disarm 41:8 disease 6:21,22 7:3 disorder 51:15 disposes 34:6 dispute 9:23 dissent 22:19 distinction 6:20 59:19 doctor 19:16 40:4 48:12 dodge 32:8 doesnt 9:12,15 9:21,25 13:14 14:21 17:2 19:1 20:9 21:17 26:5 48:1 52:11,16 54:5,5 doing 32:1 34:11 50:12,21 dont 10:23 11:23 26:3,9 27:22 32:21,25 33:8 35:8,13,16 37:18,18,25 43:3,17 45:8,16 48:2 50:7 58:13 59:13,14 door 4:12 20:8 21:25 22:9,13 23:21,22 26:18 26:22 27:13 50:11 51:23 dr 12:10 40:8 48:8,12,14,16 58:7 draw 15:22 drawing 15:2,5 59:20 drug 13:9 due 29:22 30:10 30:11 <hr/> E <hr/>
--	--	--	--	---

<p>e 2:1 3:1,1 earlier 48:3 57:18 easier 4:17 5:21 easiest 5:22 effect 3:25 effective 23:24 30:3 52:17 effects 7:14 either 6:11 20:18 26:14 40:19 45:11 element 30:21 43:17 54:3,15 emphasized 57:19 entirely 28:16 44:19 52:9 entitled 52:17 equally 42:5 error 3:19 32:20 especially 4:2 esq 1:15,17,21 2:3,6,10,13 essentially 50:2 54:23 estelle 18:13 20:4 24:15 26:12 et 13:25 evaluation 6:24 7:8 37:9 48:20 evans 37:5 40:8 everybody 31:23 evidence 3:12 4:2,7 6:16 9:1 9:13 10:18 13:1 15:13 19:14 20:1,2 21:18 22:25 23:15,23 24:4 26:15 29:16 30:23 34:19 35:20 36:2,2,6,12,19 36:22 38:1,17</p>	<p>39:2,5,15,16 40:4,5 47:9,15 47:15,16 48:1 49:12 50:22 51:16,24 52:9 53:7,17 57:2,10 57:21 evidentiary 11:21 52:22 evolved 21:7,7 exact 14:12 23:18 exactly 13:17 36:4 40:6,17 exam 19:23 20:1 20:7 23:12 28:12 29:17 35:4,25 50:22 examination 5:13 14:5 16:4 19:5,17 21:22 22:1,18,21 23:1 24:9,18,20 25:10 28:17,20 43:15 44:24 45:20 57:24 58:8,10 examine 34:21 44:13,15 45:8 examined 3:13 17:20,22 26:24 26:25 27:1 29:1 45:6,21 47:20 48:8,12 51:4 55:17 examines 45:18 45:25 examining 18:17 example 4:25 8:9 10:2 12:20 22:7 37:19 39:8 46:25 47:1 exams 53:1 exceed 11:16 exceeded 28:10</p>	<p>exceeds 13:24 exception 52:25 excluded 29:15 excludes 29:13 excluding 4:2 exclusion 35:5 excuse 48:19 execute 28:7 expand 56:17 expert 3:13,16 3:21 4:7,13,19 4:20 5:4,6,8,12 5:15,20,24 6:1 6:11,17 7:14,20 11:12,12 13:4 13:20,21 14:10 15:25 16:1,3,10 16:21,24 17:20 17:22 18:10,17 18:20,23,25 24:17,19,25 25:2,8,9 26:24 26:24,25 28:22 29:1,14 30:9 34:20 35:5,18 36:3 37:4,22,24 37:25 38:23 39:4 40:2,7 41:7,11 43:22 46:18 47:16,20 48:6 50:3,3,10 51:1,5,10,12 51:13 52:21,22 55:16,17 58:7 58:13,20 expertforexpert 18:14 experts 11:13,17 26:18,19 27:19 34:22 42:4,6 44:21,22 52:4 52:11 53:23 expired 27:24 explain 49:18 explained 25:11</p>	<p>explains 43:18 54:17 explanation 13:22 explicit 34:17 exposed 13:6 42:11 extend 26:4 57:14,15 extent 8:9 18:3 29:15 36:4 extract 48:20 50:15 extraordinary 50:18</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 8:13 23:12 38:16 48:5 51:9 52:20 56:17 58:6 factfinding 55:19 57:1, factor 57:16 factors 16:15 facts 14:19,20 23:4,18 56:18 57:4,6 factual 18:21 19:4 22:6 23:7 23:8 fair 3:23 far 4:20,20 26:4 30:25 33:22 42:7 50:8,9 54:9 favor 52:14 federal 4:20 6:14 9:8,20 10:15 11:15 12:14 13:16 16:22,23 17:2,4 20:24 21:17 28:16,17 28:20 29:9,15 30:8 34:15</p>	<p>40:11 43:19 46:25 47:15 fiction 42:7 fifth 3:15,23 5:11 7:24 8:5 10:25 12:1,8,9,18 14:10 16:18 17:22 20:7,9 21:8 26:1,4 28:9,19 29:10 30:17 33:6 34:16 36:12,23 38:12 39:10,20 41:17 42:9,17 43:4,9,12 44:7 46:6,8,10,13 47:8,11 48:22 50:13 52:19,25 53:25 54:25 55:14 56:7,20 find 20:11 30:5 56:13,18 fine 23:17 31:12 finish 6:15 15:19 firearm 39:19 fires 57:21 first 3:4,19 20:2 36:25 51:17 fit 56:18 flash 52:18 floor 48:10 focused 15:8 focusing 29:9 49:8 follow 34:9,10 35:13 41:6 59:2 59:10 follows 53:19 footnote 22:19 force 37:8,25 47:6 48:18 forced 40:19 43:14 forcing 51:22 foreign 45:3</p>
---	---	--	--	---

54:25 forfeit 36:12,23 forfeiting 37:16 forget 59:12,13 form 44:10 formulation 43:11 found 13:9 founders 39:22 four 55:7 fourth 55:23,24 56:3,21 59:8 frankly 41:20 free 16:10 58:10 front 11:24 55:20 59:22 function 4:1 54:6 further 37:8 51:14	45:14 50:2 go 8:16 14:11 15:1,4 16:13 27:16 31:18 33:22 34:24 37:8 46:14 48:2 49:10,16 50:8 56:4,8 goes 19:19 30:25 37:15 48:14 57:17 going 9:19 13:21 19:13 20:16 28:21 31:18 32:8 34:18 40:1 40:2 41:9 42:8 47:9,11 56:8 57:23 good 14:20 27:12 53:7,13,16 government 4:13 5:16 13:4,20,21 15:10 16:10,22 16:24 19:15 22:14 23:16 24:3,3,4,5,7,10 25:4 26:7,17,19 26:21 27:6 28:25 34:20 35:13,14 38:22 41:6,9 42:5 44:12,18,21 45:5,21 46:5 47:5,9 48:11,15 48:18 49:7 50:5 50:14 52:7,9,10 53:14 54:8 55:18 56:9,23 57:9 governments 11:12 14:9 18:4 34:20 41:21,22 57:3 58:7 grand 20:18 grant 19:9 27:11	granted 6:6 gray 25:24 ground 10:7 guess 23:6 <hr/> H <hr/> hadnt 57:8 halfway 49:21 50:5 hammer 53:10 53:13,17 hand 30:3 happened 9:5 18:21 37:24 40:10,11 55:13 happening 18:22 happens 8:15 19:16,24 25:24 36:15 39:14 57:23 58:15 harlans 44:3 hasnt 49:12 havent 49:24 59:3 health 3:13 4:3 5:12 18:16 37:9 55:17 57:20 hear 3:3 9:19 heard 32:23 41:23,24,24 hearing 41:19 55:25 56:5,25 57:10 heart 38:12 48:6 48:8,14 heartbeat 53:4 held 10:13 32:2 33:20 help 52:5 helpful 19:18 heres 19:15 37:23 hes 13:21 18:20 18:23 25:18 42:3 45:22	55:22 hinted 24:14 hired 45:17 hold 10:16 16:8 holding 3:24 15:22 22:24 23:4,19 25:22 41:13 honor 4:10,23 5:7,10 6:4,5,19 8:7 9:22 10:23 11:7 12:7,16 14:20 15:16 17:7 29:4,25 30:5,18 31:7,16 32:11 33:2 36:5 40:25 41:13 54:13 56:15,22 58:3 hour 28:12 30:24 50:16 huge 54:2 hundreds 50:20 hypothetical 6:5 45:15 <hr/> I <hr/> id 17:10 25:23 35:2 56:2 58:1 idea 34:6 47:5 48:18 50:14,20 identifying 13:9 ill 53:2 illustration 38:14 im 8:20,20 9:19 10:6 12:11 15:3 15:21 16:4 21:1 21:19 27:4,21 42:8,9 45:10,14 52:11,13 56:12 59:1,11 imaginary 46:20 46:21 imagine 46:13 impeach 27:3	impeachment 6:7 19:8,11 27:15 57:11 59:5,9 impermissible 15:15 implicate 8:5 9:2 implicated 5:11 12:22 implication 25:6 important 9:7 importantly 58:18 imposes 39:21 impossible 45:5 48:9 impressed 13:11 inadmissible 47:21 inappropriate 10:4 incapacitation 51:11 includes 37:16 including 58:20 inconsistent 43:7 incorrect 11:1 incredulity 48:24 incriminate 36:20 37:17 58:5 indicating 51:3 inevitably 29:2 information 31:4 50:15 initial 23:13 ink 57:21 insane 13:19,21 44:10,11 insanity 7:3 13:18 14:16 47:18 insofar 9:20 20:25 integrally 33:16 interesting 22:15
---	--	---	---	--

interjecting 54:19	invoke 58:17	11:3,11,18 12:4	21:19 22:23	5:18 9:15 15:23
interpretation 53:25	involuntary 52:23 54:18	12:11 13:2 14:1	23:6 25:13	40:1,7,15,21
interpreted 12:9 13:18 55:14	involved 8:14 30:12	14:6,15,22 15:1	42:18 49:16	43:10 50:24
interpreting 10:25	irrelevant 9:6 34:2	15:4,7,17,18	kansas 1:3,15	51:8
interrelationship 33:4	isnt 8:2 14:24 16:20 20:21	15:19,20,21,23	3:4,17,25 4:21	key 22:8 59:17
interview 50:2	irrelevant 9:6 34:2	16:7,12,20	6:6,16,19 7:1,6	kind 3:15 4:14
interviewed 40:22	issue 3:11 4:18 5:3,4,25 6:10	17:10,12,17	7:25 9:18 10:9	5:16 21:11
intoxication 6:20 7:1,7,13 10:19	issue 3:11 4:18 5:3,4,25 6:10	18:9 19:10,20	10:12,16,20,24	42:25 55:18
10:21 28:14	7:15,18,22 8:12	20:20,21 21:19	11:5,9,20,21	know 10:23
30:20,25 50:21	8:19,21 9:9	22:19,22,23	12:1,5,8,15	18:20 19:7
52:16,23 53:21	11:11,14,19	23:6,25 24:24	13:1 14:17,24	21:14 24:14
54:11,18	13:15 14:17	25:13,14 26:16	17:2 21:3,12,13	26:9,13,14 42:1
introduce 4:7 6:10 10:18	15:12 16:3,9	27:4,20,23 28:1	21:15,16,16	42:22 44:5 50:4
34:19 35:12,14	17:20 18:11	28:4,15 29:10	29:11 30:19	58:14
35:18 36:5,22	21:2,10,13 24:2	29:20 30:7,14	31:18 32:5,7,9	
47:7 53:6 56:10	24:5,7,9 25:3	30:16 31:2,9,12	32:12 33:8,19	<hr/> L <hr/>
56:25	27:21 30:10	31:17,20,22	33:24 52:15	label 26:10
introduced 7:25 9:14 14:7,8	33:5 34:8,24	32:5,14,20 33:7	54:14 55:13	lack 23:9 49:3,5
35:20 36:2 38:1	35:19 54:19	33:8,12,18 34:6	kansass 6:18	language 4:24
44:9 50:23	59:6,22	34:14 35:10,21	33:13 46:23	39:24 42:13
51:16,24 58:19	issues 11:9 51:18 51:19 57:1	36:1,10,15,17	katyal 1:21 2:10	laughter 46:3
introduces 36:11 36:19	ive 32:22	36:18 37:10,14	8:21 28:1,2,4	49:1 53:5 59:15
introducible 11:6	<hr/> J <hr/>	38:3,7,10,16	28:15 29:4,25	law 6:19 8:17
introducing 3:12 43:22	jail 28:12	39:7,13 40:1,7	30:13,15,18	11:5,21 12:5,8
introduction 8:3 8:4,25 10:13	jigger 52:24	40:15,18,21	31:7,11,15,20	12:15 21:16,17
14:9 21:2 49:11	judge 29:15,15 44:14 48:13	41:2,14,24 42:1	31:24 32:11,17	29:11 54:14
intrusion 38:13	judges 9:18	42:12,18 43:10	33:2,12 34:4,14	lead 29:2
invalidate 29:6	judgment 39:21	43:20,23,25	35:1,16,22 36:4	leads 41:6 50:9
invalidated 12:13	jury 4:2,3 20:18 55:20 59:23	44:3,5,20,23	36:14,17,25	learned 19:17
investigation 30:24	justice 1:18 3:3,8 4:5,15,16 5:3,8	45:2,4,14,17	37:13,18 38:5	led 34:10 35:13
invocation 43:8	5:17,18 6:9,25	46:4,12,16,19	38:10 39:7,20	49:12
	7:5,17,21,22	46:23,24 47:3	40:6,13,17,24	legal 31:11,21
	8:19 9:4,5,11	47:13 48:4,17	41:2,12 42:12	32:3
	9:15 10:11,12	48:23 49:2,16	43:3,14,23 44:2	legislative 53:24
		50:24 51:8,18	44:19,21 45:1,3	legislature 53:10
		52:1,2 53:2,6	45:10,16 46:10	length 11:22
		53:12 54:2 55:5	46:15,17,21	letter 43:11
		55:11,22 56:19	47:2,4,25 48:17	life 13:7
		57:22 58:4,11	48:23 49:5,16	light 27:22
		59:1,13,16,17	50:7 51:6,10,20	likeforlike 21:9
		59:24	52:1,13 53:9,18	limit 17:1
		justices 44:4	54:13 55:6	limitation 29:23
		<hr/> K <hr/>	keep 58:22	limited 17:3
		kagan 20:20	keeps 12:1	limiting 45:7
			kennedy 4:15	line 15:2,5,22

27:7 57:17 lines 49:8 literally 34:12 little 35:2,3 58:11 load 54:24 longer 3:14 longterm 7:14 look 21:6 32:13 33:13 55:23 58:13 looking 13:10,11 56:11 lose 48:25 lot 51:14	meaningful 17:24 26:7 means 23:24 46:12 mechanism 6:22 mechanisms 58:24 member 22:16 mental 3:11,13 3:21,21 4:3,18 5:12 6:10,21,22 6:23 7:3,8,15 15:11 16:3,9 17:19 18:11,15 19:5,13,23 23:12 24:17,19 28:19,22 30:9 34:19,25 35:19 37:9 38:9 43:16 47:17,18 48:19 51:2 52:6 54:3 54:4,5,8 55:17 57:20 mentioned 41:4 merely 7:10 10:6 merits 33:5 meth 51:4 methampheta... 7:16 51:12 mincey 8:11 10:3 mind 38:4,8,14 39:23 40:3,8 50:15 minimum 5:1 minutes 55:7 misinterpreted 55:14 mister 48:8 modifying 53:21 morning 3:4 motion 45:23 murder 38:19,20 54:7,12 murphy 16:16	<hr/> N <hr/> n 2:1,1 3:1 nature 15:15 57:19,20 neal 1:21 2:10 28:2 necessarily 11:23 necessary 5:19 30:6 need 19:1 36:18 36:21 53:12 needs 23:23 24:22 neurotoxicity 51:4 never 6:14 20:1 32:2,2,23 34:12 36:9 47:4 new 47:15 54:19 nicole 1:17 2:6 17:14 notice 19:25 22:13 notion 42:20 number 49:9 53:23 numerous 22:11	offense 30:21 54:15 offensive 58:23 offer 8:16 offers 26:20 30:19 oh 38:5 44:19 45:7 okay 14:23 23:10 30:14 44:15 once 3:10 4:12 5:15 6:7 27:12 42:23 43:6 47:4 49:21 55:15 ones 22:4 41:23 49:10 open 11:4,14,14 22:13 23:22 51:23 57:12 opened 4:12 21:24 23:21 26:22 opening 33:14,16 49:8 opens 20:8 22:9 26:18 27:13 50:11 operates 54:9 operation 8:17 opinion 13:23 18:16,17,23 22:17 24:18 25:9,14 27:19 44:4 51:1 opinions 5:22 opportunity 47:19 opposed 27:19 opposite 3:20 44:14 option 53:20 options 52:21 oral 1:11 2:2,5,9 3:6 17:14 28:2 49:8	order 12:3 33:10 56:18 58:22 ordered 28:20 ordering 20:6 23:12 orders 48:13 outdo 13:13 outer 12:19 outlaws 13:11 50:23 51:15,16 outside 39:10 overread 21:20 oversimplifies 24:1 overstate 51:9 overstatement 50:25 overturned 55:20 ox 48:14
<hr/> M <hr/> m 1:13 3:2 60:1 maam 15:6 mad 45:19 magatha 12:21 14:4 majority 22:17 making 12:24 29:2 53:22 man 44:10,13 46:1 mandatory 16:19 manner 10:25 26:17 marshalls 22:19 materials 58:23 matter 1:11 8:17 9:11,12,16,17 12:17,23 18:7 42:10 60:2 matters 13:1 26:10 mean 4:16 13:3 17:1 22:17 23:6 23:25 28:19 32:21 34:1 42:20 43:21 44:5 45:7 54:5 56:11 58:1		<hr/> O <hr/> o 2:1 3:1 object 38:18 objected 12:24 objection 40:12 40:14,16 53:11 obtain 10:18 obtained 7:8 8:4 8:23 obtaining 6:23 57:20 obvious 44:6 obviously 31:8 october 1:9 odd 12:5 oddity 6:12	ones 22:4 41:23 49:10 open 11:4,14,14 22:13 23:22 51:23 57:12 opened 4:12 21:24 23:21 26:22 opening 33:14,16 49:8 opens 20:8 22:9 26:18 27:13 50:11 operates 54:9 operation 8:17 opinion 13:23 18:16,17,23 22:17 24:18 25:9,14 27:19 44:4 51:1 opinions 5:22 opportunity 47:19 opposed 27:19 opposite 3:20 44:14 option 53:20 options 52:21 oral 1:11 2:2,5,9 3:6 17:14 28:2 49:8	<hr/> P <hr/> p 3:1 page 2:2 22:12 25:23 33:14,14 33:14,14 54:14 paid 50:18 parallel 39:17 parity 4:11 5:15 20:3 27:1 42:21 59:21 part 10:17 29:6 30:20 34:17 partially 29:5 participating 55:19 particular 56:14 58:14,16 particularly 33:3 58:23 parties 9:23 pay 30:23 peer 50:14 peered 40:2 peering 39:23

peers 40:8	43:2 44:6 52:24	previous 6:2	54:21	putting 4:13
people 13:5,6,8 13:10 51:3	53:11 54:1 55:2 56:7	price 28:13 30:23 35:4 43:15,20	provide 6:22 17:2,3	19:25 24:16 28:13 43:16,21 45:12 46:8 48:21 53:22
percent 37:1	policybased 41:17,20 42:16	43:21 45:11 47:11 48:21 50:17 51:23	provision 35:3	
perfect 38:14	pope 26:11	principle 20:3 21:9 22:8,11 27:1	psychiatric 24:8 39:2,16 44:22 53:1,7	<hr/> Q <hr/>
period 30:10	portash 8:11 10:3	principles 11:20	psychiatrist 10:14 25:3 27:7 27:9 31:4 36:22 36:24 38:7 40:23,23 41:1 45:17,20 46:20 46:21 47:6 50:25 56:9	qualified 18:20
perjury 20:19	portashcompel.. 20:17	prior 20:13 56:25	psychiatrists 44:9,13 53:14	question 6:6 7:23 8:8,8 10:12 11:23 12:5,8,11 13:24 15:7,23 16:2,5,21 18:3 18:24 19:2,3,9 20:21 21:4 23:7 27:2,11,17 29:8 29:9,10,21,22 30:11 32:1,6,8 32:19,22,24 33:1,5,9,15,18 33:21,23,24 34:15 36:8 37:7 41:25 44:6 48:3 52:3 57:8,12,17 57:25 59:4,12
permissible 15:24 17:9	portashmincey 10:1	privilege 7:24 8:6 9:2 42:10 43:9	psychological 43:15,22	questions 12:3 18:4,6 19:20 20:7 39:16 48:22 55:4 58:14,17
permission 17:10	portion 57:2	problem 21:16 45:1 47:23 55:24	purely 42:14	quick 59:14
permissive 29:14 35:6	position 6:1 34:5 41:3,5 45:5	problems 58:24	purposes 3:23 19:8,11 20:12 57:11	quite 24:9 30:13 30:15,17,18 34:4 36:21 43:3 50:7 51:8 59:1
person 19:16 50:1	posits 6:5	procedure 7:2 9:9 12:15 20:25 34:16	pursuant 28:17	<hr/> R <hr/>
personal 25:10	possibly 53:21	proceeded 6:15	put 7:14 13:15,16 15:11 16:4,8 17:23 18:8 23:14 24:23 26:6 28:21 29:16,24 30:3 30:22 31:3 40:20 42:5 44:18,21,22 46:5,7,17,19 46:22 48:15 50:19 52:4,5,6 52:7,11,12,17 53:19 55:15 57:1 58:13 59:22	r 3:1
personality 51:15	powell 18:14 22:7 25:21	proceeding 6:14 42:24	psychological 43:15,22	raise 20:7 35:9 49:9
persuading 49:15	practical 12:17 12:23	process 29:22 30:10,11 53:24	purely 42:14	raised 14:17 31:5
pertinent 19:13	precedence 4:24	prohibition 16:18	purposes 3:23 19:8,11 20:12 57:11	raises 30:10 36:7 48:22
petitioner 1:4,16 1:20 2:4,8,14 3:7 17:16 55:10	precedent 3:22	prohibits 46:6,8 46:11	purposes 3:23 19:8,11 20:12 57:11	raising 10:22 38:9
phrase 14:14	precedents 8:3	proof 54:8,15	pursuant 28:17	
physical 38:18 48:19	precisely 24:24 31:20 38:11 39:8	proper 14:9	put 7:14 13:15,16 15:11 16:4,8 17:23 18:8 23:14 24:23 26:6 28:21 29:16,24 30:3 30:22 31:3 40:20 42:5 44:18,21,22 46:5,7,17,19 46:22 48:15 50:19 52:4,5,6 52:7,11,12,17 53:19 55:15 57:1 58:13 59:22	
pick 49:3	prefaced 51:3	properly 3:14 11:24	puts 4:18 5:15 15:25 16:2,24 17:19 18:11 20:2 21:10 24:2 42:4 45:4	
place 50:22	preferable 49:4	proposition 32:3 32:23		
played 28:16	premeditated 54:7,12	prosecution 6:1 6:17 7:2 10:17 17:24 20:10 22:24 28:10 40:23 46:17 50:12 51:12,13 53:3,8		
playing 37:12	premeditation 54:21	protected 16:17		
plays 37:19	preparing 39:1	protection 3:15		
pleadings 6:23	presentation 22:25	prove 30:21		
please 3:9 17:18 28:5	presented 6:6 9:17 11:9 27:11			
plurality 25:11 26:11	presumably 15:9			
point 3:20 6:3 22:18 25:23 26:4 30:8,16 49:25 58:9	presuming 27:4			
points 35:8 54:14	pretrial 58:22			
policies 56:3	pretty 21:6 23:20			
policy 32:21 41:24 42:2,14 42:18,19,25	prevail 10:9			
	prevents 44:7			

ranging 50:23	refocus 55:12	responding	34:15,17,23	29:10 32:5,14
rationale 18:15	regard 16:14	20:10	35:2,6 47:15,15	32:20 33:8,12
23:20	57:3,14,15	response 21:7	47:25 52:7,12	34:7 36:10,15
reach 32:21 33:1	regarding 35:19	47:14 52:2,8	53:13,15,19	36:17,18 37:10
reached 32:18	related 6:5 12:3	56:14 59:14	59:21	37:14 38:3,7,10
reaches 32:24	14:4,13,15,24	restrictions	ruled 59:3	41:14 43:20,24
read 20:5	18:7 31:5,13	53:22	rules 4:22 6:18	53:2,6
reaffirm 14:2	relevancy 12:20	result 19:24	9:8,18 12:14	scalias 25:14
reality 38:25	relevant 4:2 14:4	26:14	13:1 17:2 20:1	schmidt 1:15 2:3
54:5	rely 21:20 22:4	reverse 32:7	20:24 21:14,15	2:13 3:5,6,8 4:9
really 9:6 16:5	27:7	reversed 3:19	21:18 30:8 52:3	4:23 5:7,10 6:4
18:16,25 20:3	remaining 55:8	32:25	52:17,22	6:13,19 7:5,17
24:10 25:3 26:9	remand 11:19	review 58:21		7:21 8:7 9:3,10
42:15 44:20	32:13	right 4:8 5:9 7:4	S	9:22 10:23 11:7
49:6 51:25 54:2	remanded 11:8	10:17,22 12:15	s 2:1 3:1	11:18 12:7,16
reason 7:10	repeated 22:11	14:6 20:9 23:3	saharsky 1:17	14:1,13,19 15:3
15:10 29:7 41:7	repeatedly 57:19	24:12 25:16	2:6 17:13,14,17	15:6,14 16:6,12
41:17,20 49:4	report 15:10	26:23 28:25	18:12 19:19	17:6 55:7,9,11
59:18	58:19	29:5 30:2,4,4	20:20 21:4 22:6	56:15,22 58:3,6
reasonable	reports 23:1	30:15,18 31:9	23:3,10 24:12	58:16 59:16
18:25	requested 21:22	31:20 34:4,20	25:6,19 26:23	scope 11:12,16
reasonably 14:4	23:2 35:24	35:1 36:23	27:10,25	11:19,23 12:13
14:12,13,15,24	requesting 16:14	37:16 40:2 43:4	salvucci 57:8	12:19 14:2 17:4
18:7 31:4,13	requisite 51:2	45:2,19,22,24	sane 44:16 46:1	18:4 28:8 29:9
reasoning 41:15	reserve 17:11	46:2 48:1,7,13	46:1	33:5,15,18 34:2
42:16 59:10,18	resolve 8:12	48:17 51:19,20	saying 12:11	34:24 51:18
reasons 3:19	11:10 12:6	52:18,19 56:13	13:20 15:24	scott 1:6 28:6,10
25:20 28:7	58:24	59:8	30:22 34:7	39:12
44:16 55:2 56:2	resolved 11:20	rights 26:2 30:2	36:11 40:17	search 41:22
rebut 16:1 17:21	12:14 13:1	36:13	41:9 42:2 44:17	second 3:21 6:3
18:25 22:14,25	respect 12:19,25	rise 9:25	45:10 46:5	6:6 19:3 27:11
27:2 34:21	15:23	roberts 3:3 17:12	48:15 52:8	see 8:20 56:8,12
35:15 59:21	respond 4:13	18:9 19:10	54:23 55:22	seek 58:22
rebuttal 2:12	5:16 16:11	27:23 28:1	says 19:7 22:19	seeking 55:20
3:16,21 10:18	17:25 18:5	38:16 39:13	27:5 28:24	selfincriminate
11:16 12:1	21:11 22:10	55:5 57:22 58:4	34:18,23 35:3	20:18
23:16,24 26:8	24:3,4,6,10,11	58:11 59:13,24	35:17,17 36:1	selfincrimination
33:21 55:9	25:4,5 55:18	route 5:22	44:12,15 45:18	9:2 16:19,19
rebutting 54:20	respondent 1:22	rule 3:25 4:10,11	47:16 48:5,11	29:21 30:4
reciprocity 42:21	2:11 3:10,18	5:1,15 9:8,20	48:14 56:4,6,7	36:13
recognized 8:9	5:13 10:2 11:22	11:15,15 15:25	56:8	send 11:4 31:17
12:18,20 20:4	12:24 28:3 58:8	16:13,23 17:4	scalia 4:5,16 5:3	32:6,25 33:25
recognizes 52:15	58:17	20:22,24 21:5,7	5:8 10:11 11:3	sense 51:22
record 31:19	respondents	24:12 28:18,18	12:4,11 22:22	separate 21:13
58:6	58:21	28:24 29:3	23:25 24:24	22:18,20

serious 13:24 30:11	solicitor 1:17	22:10 23:12,23	39:1	59:9
session 50:16	solution 21:16	24:1,17,18,19	subsequently	takes 18:1,7
set 20:17 40:3	someones 50:15	24:25 25:1,7	9:13	19:15 25:25
settle 9:12,16,21	somewhat 15:17	26:23,25 28:6	substantially	27:5 37:2,5
10:24	sorry 15:3 46:7	28:12,23 30:19	56:17	43:6
settled 8:2,24	59:11	31:3 34:9,9,11	sudden 57:25	talk 17:3 36:24
settles 9:10	sort 8:11 9:24	34:19,25 35:18	sufficient 20:6	38:1 47:6 51:14
seven 44:4,12,18	10:11 58:22	37:8,25 39:5	23:11	talked 37:21,22
sheriff 13:22	sorts 12:23 52:21	40:10,25 43:16	suggest 16:14	talking 5:12
shot 13:22 49:15	sotomayor 15:1	47:15,18 51:2	51:15 57:14	18:19 21:21
50:5	15:4,7,17,19	51:16 52:6,15	suggested 14:3	22:1 27:21
shoulder 54:24	15:21 16:7,12	52:20 53:20	21:14 49:10	35:23 39:11,15
shouldnt 56:10	27:4,20 48:23	54:3,4,5,9,24	51:14	tell 10:20 49:3
57:15 59:2,19	49:2 51:18 59:1	55:25	suggesting 21:2	tells 27:6 57:24
show 54:10	59:17	statement 6:3	26:16	terminate 58:9
shut 27:13 52:9	sought 4:7 56:23	7:19 16:11 21:1	suggests 4:25	58:12
side 7:11 17:23	sound 48:14	27:9,19 56:1,6	43:8 53:19	terms 5:14
26:6 34:7	speak 5:5 14:2	statements 7:25	support 55:16	terribly 19:13
sides 7:14 14:20	25:2 50:3	8:3,4,10,23,25	supported 3:11	test 9:10 31:13
31:21 32:3	specific 12:25	18:21 19:5,12	supporting 1:19	testified 6:8 13:3
similar 36:21	18:15 21:13	20:12 27:3,18	2:8 17:16	13:4 51:1,6,9
56:6 59:10	23:4	27:22 38:18	suppose 30:8	51:11
simmons 30:1	specifically	39:3 56:24 59:5	40:11 47:13,13	testifies 4:18
44:3 51:21	21:22 57:7 58:7	states 1:1,12,19	58:17	19:6 24:19
55:23 56:16,18	speech 15:9	2:7 9:14 17:15	suppression 56:5	47:17 50:10,10
56:23 57:9,13	squarely 32:2	25:8 30:20	57:10	testify 5:9 6:2
57:15 59:2,18	34:12	38:12 39:24	supreme 1:1,12	25:1 28:22 30:9
59:23	stairs 48:7	41:5 54:16	3:17,25 10:12	36:16,18 42:9
simonslike 40:18	stand 8:16 12:2	status 3:11	10:16,24 12:9	48:9 51:5 55:16
simplest 28:8	18:2,7 19:6,15	statute 12:20	21:12 32:7,10	55:24 56:4
simply 10:16	25:25 26:1 27:5	stop 20:10	32:12 33:24	testifying 24:17
18:11 24:23	37:2,3,5,24	story 17:24 26:6	55:13	testimony 3:12
26:20 30:8	42:3 43:6 44:8	study 38:20,24	sure 9:18 15:20	6:11 10:14 11:5
31:13 47:25	44:18 48:16	stuff 48:20	16:5 25:6 47:8	11:16,17 12:10
52:14 54:20	55:16 59:9	subject 8:17 18:7	52:11,13 59:1	17:20,21 18:16
situation 18:1,14	standard 10:1	37:3,4,5 42:3	suspect 10:6	18:20 19:1
19:22 20:14	14:3 31:11,21	49:22	11:7 14:21	20:17 23:15
24:21 35:24	start 6:15 59:20	subjected 49:23	system 16:23,23	26:20 29:13
39:22 56:7	started 19:20	submit 18:10	37:12 46:22,23	33:21 35:12,14
sixth 54:16	57:17	29:17 30:23		35:18 43:22
slam 27:13	state 4:19 5:4,5	36:19 37:8	T	44:24
small 29:6 34:17	6:10 9:6,19	submits 38:20	t 2:1,1	testing 39:3,15
smith 4:25 24:15	15:11 16:3,9	submitted 59:25	take 5:22,23 6:1	tests 39:18
48:8 57:4	17:19,21 18:11	60:2	44:8 49:14	text 43:4
	21:10,18 22:2	submitting 35:4	55:25 56:24	thank 17:12

27:25 28:4 55:5 55:11 59:16,24 thats 4:10 5:14 6:3,3 7:22 8:19 9:9,9,17 11:1,3 11:13 13:24 17:5 18:12 21:23 22:3,6 24:9,9,12,22 25:3,20,22 26:23 27:10 28:7 29:5,20,21 30:10 31:15,20 32:20,20 33:3 33:15 34:4,23 35:1,7,16,23 37:19 38:3,12 39:17,17,23 41:2 42:7,18 43:3 45:1,19 46:4 47:7,12 48:17 49:4 50:24 51:18,19 52:7 53:7,10,11 56:4,11 57:21 58:11 59:23 thenjudge 26:13 theory 5:23 25:13,15 41:23 49:2,3,11 thered 15:9 theres 6:11 16:8 19:3 20:25 21:9 27:17 32:15 40:4 56:20 59:8 theyll 44:14 thing 37:15 44:7 46:1 things 13:3 19:17 49:22 53:23 think 7:18 9:12 9:22 11:14,23 12:7 14:2,20 16:13 17:25 18:5,12 19:18	19:19 20:12 21:5 22:7,10,15 23:19 24:1,14 24:21,22 26:9 26:10,11 27:10 27:14 29:4,7,18 31:8,15,25 32:9 32:11 33:2,8,10 33:16 34:5 35:1 35:5,7,10,16 36:7 37:18,19 37:25 38:5 39:7 39:20,23 41:15 41:21 42:12,14 43:3,18 44:3 45:16 47:2 48:2 48:17,21 49:5,9 49:18 50:7 51:8 51:20,21 52:2 53:11,18 54:17 55:22 56:11,15 58:10 59:7,17 thinking 29:13 third 3:24 48:10 thompson 43:8 thought 8:23 21:12 42:2 three 3:19 44:9 threshold 8:8,12 11:25 time 7:19,24 8:22 8:25 9:13 17:11 18:22 27:23 36:15 58:18 times 22:11 42:8 42:11 today 5:2 told 50:4,21 topeka 1:15 totally 44:10,11 44:16 45:19 treated 42:5 trial 3:10 4:1 8:1 8:5,15 9:1,14 12:25 19:6	23:14 29:15 50:17 54:19 56:1 57:2 58:19 troubled 15:22 true 4:6,6,9,24 9:3 49:25 52:23 truly 7:12 8:10 truthseeking 4:1 try 33:13,13 49:14 54:1 59:14 trying 10:6 27:2 28:6 52:24 56:12 two 25:20,22 30:2 type 20:16 39:22 types 13:8 <hr/> U ultimate 33:5 ultimately 29:6 31:25 32:18 41:12,21 42:13 51:25 unable 25:9 unconstitutional 8:22 29:3 35:7 35:11 45:13 uncounseled 28:11 30:24 50:16 undergo 22:3 24:8 28:13 43:15 48:19 underlying 56:3 undermining 4:1 understand 6:13 9:16 32:21 34:18 37:10 39:13 47:8 55:2 58:12 59:2,3 understanding 21:8 25:15 understood	22:16 unfair 39:4 unique 19:22 24:21 50:13 united 1:1,12,19 2:7 17:15 38:12 39:24 41:4 54:16 unmirandized 28:12 30:24 50:16 unnecessarily 32:24 unreasonable 29:23 unreliable 47:19 unusual 13:5 36:11 unvarnished 56:24 use 6:2,7 7:16 15:10,12 16:10 19:8,23:16 26:25 28:6 37:9 42:16 56:1,5 57:9,20 59:4 users 13:9 uttered 28:11 <hr/> V v 1:5 3:4 24:15 38:11 39:24 43:8 54:16 vacate 32:12,15 32:15 valuable 19:14 value 39:21 values 16:17 variety 11:8 13:6 ventris 8:10 27:14 view 40:21,22 violated 10:15 29:19 violates 28:19	34:16 43:12 violation 7:24 voluntary 6:20 7:1,7,13 10:19 10:21 28:13 30:19,25 50:20 51:11 52:15 53:21 54:11 <hr/> W wait 23:25 waived 25:17 26:1 waiver 9:13 16:8 16:9 25:13,15 25:16,19 26:3 28:9 41:18 42:7 49:2,9 59:8 waiving 37:16 42:9 walk 29:12 walked 37:22 want 14:21 17:7 43:1 52:5 55:1 59:21,21 wanted 13:15,16 20:11 29:16 56:13 58:9 wanting 13:12 wants 23:10 47:10 55:24 washington 1:8 1:18,21 wasnt 8:24 22:16 33:19 41:18 way 10:9 17:3 21:6,20 26:14 38:6,11 39:14 41:15 42:13 45:11 48:25 50:6,9 weak 48:6 weapon 38:19,21 wed 14:7 wednesday 1:9
--	---	--	--	--

welner 6:16 58:7	8:20 21:3 28:7	2		
welners 12:10	32:16,16 56:4	2 9:8 11:15 20:22		
went 11:12 12:12		20:24 28:12,18		
51:13	X	28:18,24 29:3,7		
weve 24:13	x 1:2,7	29:12,13 30:24		
25:19 41:23,23		32:19 34:16		
41:24 59:19	Y	35:3,8,17,17		
whats 14:11	yeah 48:21	36:7 45:22,23		
15:22 32:16	years 42:15	50:16		
34:8 42:21,21	50:20	2013 1:9		
42:22 56:14	youd 14:22 56:19	28 2:11		
whatsoever	youll 49:18			
44:11	youre 13:19	3		
wholly 39:10	15:24 20:17	3 2:4		
45:3	29:2 31:2,2	30 42:15		
whos 17:20	39:1,15 44:17	36 54:14		
whove 45:6	45:7,14 46:5			
wish 22:3	48:15 52:8	4		
wishes 14:2	54:22 56:8	4 35:17,17		
16:13	59:11	40 33:14		
witness 7:3,6	youve 16:5 41:18	42 33:15		
8:16 12:2 42:23	49:21	425 22:12		
43:5,6 44:8				
45:18,21 46:7,9	Z	5		
46:18,20 49:20		5 22:19		
49:21,23 50:2	0	51 28:12 30:24		
52:16	03 1:13 3:2 60:1	50:16		
witnesses 14:10		55 2:14		
28:22,22 45:6,8	1			
46:6	10 1:13 3:2	6		
wondering 21:19	100 42:8,10			
word 14:12 41:1	11 60:1	7		
words 13:17 14:6	12 9:8 11:15	75 37:1		
28:7,10 36:7	20:22,24 21:5			
39:9,12 47:7	28:18,18,24	8		
50:11 54:23	29:3,7,12,13			
work 39:8	32:19 33:14	9		
works 45:20	34:16 35:3,8,17	9 33:14		
wouldnt 6:18	35:17 36:7			
7:23 12:14 17:7	45:22,23			
30:7 33:19	12609 1:4 3:4			
38:18,19,21	15 25:23			
42:10	16 1:9			
write 5:22	17 2:8			
wrong 7:17 8:20	1964 16:16			